

BANKRUPTCY AND
BILLS OF SALE

BANKRUPTCY AND BILLS OF SALE

An “A B C” of the Law

INCLUDING

Practical Notes on the Preparation of Deeds
of Arrangement and Statements of Affairs

TOGETHER WITH

NUMEROUS FORMS

BY

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PREFACE

THE object of the present work is two-fold. It is designed, in the first place, to provide a short and, so far as is consistent with brevity, sufficiently complete statement of the law of Bankruptcy and Bills of Sale. In the second place it is intended to be a guide for practical, every-day use, a text-book which the lawyer or the accountant who has to do with Bankruptcy may keep at his elbow.

The decision to adopt the "A B C" arrangement was not arrived at without considerable hesitation. The idea was inspired by Mr. Shewell Cooper's excellent "Practical Notes on Company Law." An attempt has been made to surmount the difficulties of alphabetical order by numerous cross-references. The work is in effect, its own index. For example, under the heading "Forms" there will be found references to all the forms which are printed in various places throughout the book.

The author has endeavoured to explain the principles of Bankruptcy and Bills of Sale as clearly as possible. To deal lightly with this branch of the law would be a task of extraordinary difficulty. The one bright spot in a series of dun-coloured pages is the origin and derivation of the term "Bankrupt," which the reader will find on p. 40. Where the actual words of an Act of Parliament are of importance, the author has deemed it necessary to set out entire sections, taking care, of course, to explain their meaning by notes of decided cases.

Special attention has been paid to those branches of the subject which are of every-day interest to chartered accountants. As a result of his researches the author has been enabled to supply practical notes on the accounts of a trustee in Bankruptcy, the preparation of Deeds of Arrangement, and Statements of Affairs.

In dealing with the Accounts of Trustees he has derived great assistance from a lecture delivered to the Chartered Accountants Students' Society in 1906 by Mr H R Graves, A C A For some of the practical notes on Deeds of Arrangement he is indebted to a lecture by Mr W R L Trickett, delivered to the Incorporated Accountants Students' Society in 1905, while the prize essay of Mr A H Partridge on "The Preparation of a Statement of Affairs," read before the Chartered Accountants Students' Society in 1905, has also been found most useful

For many valuable practical suggestions he desires to thank Mr A E Tilley, F C A, of the firm of Singleton, Fabian, & Co, Staple Inn

With regard to cases, and the table of cases, it has only been possible, as a rule, to give one reference It is hoped, however, that the fact that the date is always given in the text will enable every case to be found by any reader who has a series of reports to hand

Should any omission or mistakes be found, the author will be pleased to receive intimation thereof He will also gladly welcome any suggestions for the improvement of the work

W VALENTINE BALL

3 BRICK COURT,
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Bankruptcy and Bills of Sale

An “A B C” of the Law

ABROAD (and see *Foreigner*).

Debtor going By going abroad with intent to defeat or delay his creditors, a debtor may commit an act of bankruptcy (B A , 1883, s 4) This is not the case, however, if the debtor's permanent home is abroad (*Ex p Brandon, In re Trench*, 1884, 25 Ch D 500) Where a debtor resides abroad, the *onus* of proving that he is domiciled in England is on the petitioning creditor (*Ex p Cunningham*, 1884, 13 Q B D 418) , (see further, *Acts of Bankruptcy*, p 16)

Property Abroad The “property” which vests in a trustee includes property situate abroad (s 168), (see *Callender, Sykes & Co v Colonial Secretary*, 1891, A C 460 , see also *Property Divisible amongst Creditors*, p 246 As to service of proceedings abroad, see R 195)

ABSCONDING DEBTOR

A debtor may in certain cases, after a bankruptcy notice or the presentation of a petition, be arrested if he has absconded or is about to abscond (see *Control over Person and Property of Debtor*, p 91) For a debtor to abscond from England may also be an act of bankruptcy (see *Acts of Bankruptcy*, p 16) As to absconding with property, see *Fraudulent Debtors*, p 172

ABSENTING, MEANING OF (See *Acts of Bankruptcy*, p 17)

ABSOLUTE BILL OF SALE (See *Bills of Sale*, p 58)

ACCOUNTANT

Generally An accountant may be employed to assist a bankrupt in preparing his statement of affairs (B A , 1883, s 70 , R 326) For an outline of the duties of an accountant in preparing a statement of affairs, see *Statement of Affairs*, p 302 An accountant's bill must be taxed, and the taxing master must be satisfied that the employment was duly authorised (B A , 1883, s 73) The accountant must, on request of the trustee, deliver his bill to the proper

ACCOUNTANT (cont)

officer for taxation If he fails to do this, he may forfeit his claim (see Rs 104-128) If the taxation has been made by a County Court Registrar, the Board of Trade may order it to be reviewed by a High Court Registrar Where an accountant is paid for assistance in the preparation of a scheme of arrangement, he may have to refund his fees to the trustee, owing to the relation back of the trustee's title (see *Title of Trustee*, p 314)

Accountant's Charges Where the employment of an accountant has been duly sanctioned, and in the absence of any special arrangement with the official receiver or the trustee for a smaller amount, the following charges may be allowed —

For preparing balance-sheet, investigating accounts, &c, principal's time, exclusively so employed, per day of seven hours, including necessary affidavit	$\left\{ \begin{array}{l} \text{£} \quad \text{s} \quad \text{d} \\ 1 \quad 1 \quad 0 \\ \text{to} \\ 5 \quad 5 \quad 0 \end{array} \right.$
Or such other sum as the Court may under special circumstances order	
Chief clerk's time	$\left\{ \begin{array}{l} 0 \quad 10 \quad 6 \\ \text{to} \\ 1 \quad 11 \quad 6 \end{array} \right.$
Other clerk's time, per day of seven hours	$\left\{ \begin{array}{l} 0 \quad 7 \quad 6 \\ \text{to} \\ 0 \quad 16 \quad 0 \end{array} \right.$

These charges shall include stationery, except the forms used

These charges are subject to reduction by agreement with the official receiver or the trustee, or to increase with the sanction of the committee of inspection and the official receiver

ACCOUNTS.

(1) Of Debtor : A debtor may be compelled to furnish a cash account, and also trading and profit and loss accounts (see *Duty of Debtor*, p 154)

(2) Of Official Receiver Where a composition or scheme of arrangement is sanctioned, the official receiver must account to the debtor or to the trustee, and where there has been an adjudication, and a trustee is appointed, he must account to the trustee The debtor or trustee, if dissatisfied with the account, may report the matter to the Board of Trade (R 336) One-sixth of the creditors may call upon the trustee or official receiver to furnish accounts (B A, 1890, s 17, R 315) (See further, *Official Receiver*)

(3) Of Trustee (see *Accounts of Trustee*), and as to accounts of trustee under a deed of arrangement, see *Deed of Arrangement*, p 119

ACCOUNTS (*cont*)

(4) Of Special Manager · As to the duty of special manager to account, see *Manager*, p 191

(5) Where there is a Secured Creditor As to taking accounts where a creditor holds a mortgage over property of the debtor as security, see *Mortgaged Property*, p 202

(6) Rules as to : See generally Rs 285-296, which provide for (*inter alia*) the keeping of a record book (see *Record Book*) (R 285), cash book (R 286), their submission to the committee of inspection (R 287), audit by committee (R 288), audit by B T (R 289), and accounts of joint and separate estates (R 293)

ACCOUNTS OF TRUSTEE.**(a) GENERALLY**

- (i) *Account at Bank of England*
- (ii) *Account at local bank*
- (iii) *Trustee not to retain moneys of the bankrupt*
- (iv) *Trustee's private account*
- (v) *Statements of accounts to creditors*

(b) BOOKS TO BE KEPT BY TRUSTEE, p. 4.

- (i) *Generally*
- (ii) *Trustee's cash book*

(c) AUDIT OF ACCOUNTS, p 6

- (i) *Audit by Committee of Inspection—*
 - Trading Account*
 - Cash book*
- (ii) *By Board of Trade*
 - Generally*
 - Books sent to Board for six-monthly audit*
 - Books sent to Board for final audit*

(a) GENERALLY

(i) **Account at Bank of England** Every trustee must, as a general rule, pay the money received by him into the Bankruptcy Estates Account at the Bank of England (B A, 1883, s 74 (3))

(ii) **Account at a Local Bank** Where it appears to the committee that for the purpose of carrying on the debtor's business, or of obtaining advances, or because of the probable amount of the cash balance, or for any other reason, it is for the advantage of the creditors that the trustee should have an account with a local bank,

ACCOUNTS OF TRUSTEE (*cont*)

the Board must, on the application of the committee, authorise the trustee to make his payments into and out of such local bank as the committee may select

Such account must be opened and kept by the trustee in the name of the debtor's estate, and any interest receivable in respect of the account is part of the assets of the estate

The trustee shall make his payments into and out of such local bank in the prescribed manner S 74 (4)

In small bankruptcies, unless the Board of Trade otherwise orders, all payments are made into and out of the Bank of England (B R 273 (6))

(iii) **Trustee not to retain moneys of the Bankrupt** If a trustee at any time retains for more than ten days more than £50, or such other amount as the Board in any particular case authorise him to retain, then, unless he explains the retention to the satisfaction of the Board, he must pay interest on the amount so retained in excess at the rate of twenty per cent, and can have no claim for remuneration, and may be removed from his office by the Board, and becomes liable to pay any expenses occasioned by reason of his default (s 74 (6))

The twenty per cent interest referred to in this subsection is payable to the estate of the bankrupt (*In re Sims, Ex parte* O R 1907, 2 K B 36)

(iv) **Trustee's Private Account** No trustee in a bankruptcy, or under any composition or scheme of arrangement, shall pay any sums received by him as trustee into his private banking account (B A 1883, s 75).

(v) **Statements of Accounts to Creditors** The trustee or official receiver must, when so required by a creditor acting with the concurrence of one-sixth of the creditors, furnish a statement of account. The person requiring the statement must, however, deposit a sum to defray the cost of furnishing and transmitting the accounts (B A, 1890, s 17). Again, any creditor who has proved his debt may apply for and obtain a copy of the accounts as shown by the trustee's cash book up to date, on payment of the proper charges (B R 314)

(b) **BOOKS TO BE KEPT BY TRUSTEE**

(i) **Generally** The trustee must keep, in manner prescribed,

ACCOUNTS OF TRUSTEE (*cont*), (*indeb*, p 3)

proper books, in which he shall from time to time cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed, and any creditor of the bankrupt may, subject to the control of the Court, personally or by his agent, inspect such books (B A, 1883, s 80) He must also keep a distinct account where he carries on the business of the bankrupt (R 308) The Court will not allow the debtor to inspect these books except in special circumstances (*In re Solomons*, 1904, 2 K B 760, and see further, *Record Book*)

(11) Trustee's Cash Book

The following rules should be observed in writing up the cash book —

- (1) All entries must be full and explicit
- (2) Petty expenses should be entered in sufficient detail to show that no estimated charges are made, and vouchers should where possible be obtained
- (3) The actual dates upon which all moneys are received on account of the estate should be shown
- (4) Payments out should be entered as of the date when the cheques are issued, except in the case of dividends, which should be entered in one sum as of the date when the cheques are received
- (5) All cash withdrawn from bank, whether local bank or bankruptcy estates account, should be entered on the receipts side of the cash book in the "Withdrawn from Bank" column, but not in the total column All payments into bank should be entered on the payments side in the "Paid into Bank," but *not* in the total column
- (6) In the case of any sale by private contract, the cash book should show the name, address, and occupation of the purchaser, and the mode in which the amount of the purchase money has been arrived at
- (7) In the case of a sale by public auction, the gross proceeds must be collected by the trustee, and entered on the receipts side of the cash book, and the auctioneer's charges, after being duly taxed, should be entered on the payments side.

ACCOUNTS OF TRUSTEE (*cont*), (*index*, p 3)**(c) AUDIT OF ACCOUNTS**

(i) **Audit by Committee of Inspection . *Trading account*** This is audited by the committee of inspection not less than once a month It must be verified by affidavit before submission to the committee, and must be certified by them (R 308 (2))

Cash Book This is audited by the committee not less than once in every three months The cash book entries must be supported by the production of the record book and vouchers, and must also be certified by the committee when duly audited Where there is no committee of inspection the accounts are sent direct to the Board The cash book is also audited by the Board of Trade on the expiration of every six months from the date of the receiving order, and forthwith on the final realisation and distribution of the estate (See Rr 287-289)

(ii) **Audit by Board of Trade *Generally*** Every trustee must, at such times as may be prescribed, but not less than twice in each year during his tenure of office, send to the Board, or as they direct, an account of his receipts and payments as such trustee (B A , 1883, s 78 (1))

The account must be in a prescribed form, and be made in duplicate, and must be verified by a statutory declaration in the prescribed form (*ib* ss (2))

The Board of Trade must cause the accounts so sent to be audited, and for the purposes of the audit the trustee must furnish the Board with such vouchers and information as the Board may require, and the Board may at any time require the production of and inspect any books or accounts kept by the trustee (*ib* ss (3))

When any such account has been audited, one copy thereof must be filed and kept by the Board, and the other copy is filed with the Court, and each copy is to be open to the inspection of any creditor, or of the bankrupt, or of any person interested (*ib* ss (4)) The Bankruptcy Rules provide for a half-yearly account and audit (R 289) , that an affidavit shall be filed where there have been no receipts since last audit (R 291) , for distinct accounts where the business of the debtor is carried on by the trustee (R 308) , and that there must be distinct accounts where there are joint and separate estates (R 293)

ACCOUNTS OF TRUSTEE (*cont*), (*index*, p 3)

Books, etc, sent to the Board for Six-monthly Audit The following books and documents must be sent to the Board on the six-monthly audit —

- (1) A complete copy of the cash book, with copies of the certificates of the committee of inspection
- (2) A summarised copy of the cash book containing only "Total" and "Bank" money columns After the audit this is forwarded to the local court for registration
- (3) Affidavit by the trustee to which a two-shilling bankruptcy stamp is attached Sometimes the affidavit will state "No receipts or payments"
- (4) The trading accounts (if any) with vouchers and affidavits
- (5) Special Manager's accounts (if any) with vouchers and affidavits
- (6) Receipts for cash paid
- (7) Allocaturs for taxed costs
- (8) Vouchers in support of assets realised, e.g., auctioneer's sale account and marked catalogue, if any
- (9) Record book
- (10) Bank pass book (where a local bank account has been authorised) and certificate of balance from the bank manager
- (11) Order on Bankruptcy Estates Account for payment to B T for audit fees on assets realised
- (12) A report on the position of the estate in the prescribed form
- (13) *With the first account only* an office copy of the "front sheet" of the Statement of Affairs, and also of Schedules B C F G and H attached thereto (For these copies a small fee is payable at the registrar's office)

Books sent for Final Audit The following additional books are to be sent in for final audit —

- (1) Form of statement (or statements) accompanying notice of dividend
- (2) Form of statement accompanying notice of intention to apply for release
- (3) Creditors' receipt for dividends
- (4) Formal application for release.

ACCOUNTS OF TRUSTEE (*cont*), (*index*, p 3)

- (5) Affidavit (having two-shilling stamp) verifying postage to prescribed persons of intention to apply for release
- (6) Certificate of trustee and committee of inspection (if any) as to realisation of all reasonably available debts
(NOTE *If the trustee certifies that all the property has been realised this will not be required*)
- (7) Form of notice of release for insertion in the *Gazette*
- (8) Order on the Bankruptcy Estates Account to credit the Board of Trade with 2s. 6d per cent. on the assets realised and brought to credit
- (9) Statement of dividend or dividends declared, distinguishing between those claimed and those unclaimed
- (10) Cheques for unclaimed dividends (if any)

ACT OF PARLIAMENT.

The two principal Acts of Parliament which contain the law of bankruptcy are the Bankruptcy Act, 1883 (46 & 47 Vict c 52) and the Bankruptcy Act, 1890 (53 & 54 Vict c 71) R 353 of the Bankruptcy Rules, 1886 (which are to be read as one with the rules of 1890) provides that "where no other provision is made by the Act or these rules, the present law procedure and practice in bankruptcy matters shall so far as applicable remain in force" It may therefore be necessary to occasionally refer to the older Bankruptcy Acts in order to ascertain the law

ACTION (and see *Stay of Proceedings after Bankruptcy*)

Against Debtor No action may be brought by a creditor against the debtor after the receiving order, except on terms and by leave of the court (see *Receiving Order*, p 262)

By Debtor The fact that a debtor has brought frivolous and vexatious actions may be a ground for refusing his discharge (see *Discharge of Bankrupt*, p 127)

By Undischarged Bankrupt See *Property Divisible amongst Creditors*, p 246

By Creditor A creditor cannot sue for dividend (B A, 1883, s 63), or to enforce payment of a composition (R 211)

By Trustee See *Trustee*, p 330, by trustee and bankrupt partners, see *Partners and Joint Debtors*, p 214

ACTION (cont)

As to how far a right of action passes to the trustee in bankruptcy, see *Property Divisible amongst Creditors* p 245

Against Trustee An action may be brought against a trustee for malicious prosecution under the Debtors Act (*Mitlens v Forcman*, 1888 58 L J Q B 40)

Against Official Receiver As to actions against official receivers, see R 339

ACTOR

As to the appropriation of an actor's pay in bankruptcy, see *Realisation of Property*, p 260

ACTS OF BANKRUPTCY**GENERALLY**

- (a) *Conveyance or assignment to trustee for creditors*, p 10
- (b) *Fraudulent assignment of property or part thereof*, p 11
- (c) *Fraudulent preference*, p 16
- (d) *Departing from or remaining out of England*, p 11
- (e) *Allowing goods to remain in sheriff's possession for twenty-one days* p 17
- (f) *Declaring inability to pay debts*, p 18
- (g) *Non-compliance with a bankruptcy notice*, p 19
- (h) *Notice of intention to suspend payment*, p 23
- (i) *Under s 5 of the Debtors Act, 1869*, p 23

GENERALLY An act of bankruptcy may be defined as the doing or omission to do something by a debtor which enables a bankruptcy petition to be presented against him. So far as subsequent dealings with the debtor's property are concerned, the title of the trustee commences at the date of the first act of bankruptcy committed within three months before the date of the petition. (See *Title of Trustee*, p 312)

An act of bankruptcy may be a protected transaction within the meaning of s 49 (see *Protected Transactions*, p 253)

As to what amounts to notice of an act of bankruptcy, see *Protected Transactions*, p 254

The various acts or defaults upon which a petition may be presented against a debtor are—with one exception (see para (e), *infra*, p 17)—set out in s 4 (1) of the B A 1883. This provides

ACTS OF BANKRUPTCY (*cont*), (*index*, p 9)

that a debtor commits an act of bankruptcy in each of the following cases —

(a) CONVEYANCE OR ASSIGNMENT TO TRUSTEE FOR CREDITORS

If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.

Effect of subsection : Speaking generally, this subsection intends that if a man takes a step which makes it obvious that he is about to part with the control of his property, he shall become liable to bankruptcy proceedings. It is not necessary that he should make an assignment of *all* his property, nor is it necessary for the court to enquire into the intent with which he makes the assignment. Certain words and phrases used in the subsection call for particular attention —

- (i) “ *Or elsewhere* ” The words “ or elsewhere,” which were first introduced into the statute 6 Geo IV c 16, make it plain that this particular act of bankruptcy may be committed anywhere. So that if an Englishman were to go to France or Germany and execute an assignment within this section, this would be an “ act of bankruptcy ” (see per Cotton L J, in *Ex p Blain, In re Sawers*, 1879, 12 Ch D at p 532)
- (ii) “ *Conveyance or assignment* ” The “ conveyance or assignment ” must, however, be one which is intended to operate according to English law. A conveyance executed by a foreigner domiciled abroad in his own country would not be a conveyance or assignment within the subsection (*Ex p Crispin*, 1873, L R 8 Ch 374). Although it was held in *In re Spackman*, 1890, 24 Q B D 728, that the assignment must be an assignment in the strict legal sense, yet it has since been held that an actual conveyance is not necessary, it is sufficient to make a declaration of trust (*In re Hughes*, 1893, 1 Q B 595). A debtor executed a deed by which he granted and assigned all his property (except leaseholds) to trustees on trust for realisation and division amongst all his creditors as in

ACTS OF BANKRUPTCY (*cont*), (*index*, p 9)

bankruptcy The same deed contained a declaration that he would stand possessed of all leaseholds in trust for and to convey the same as the trustees should from time to time direct This was held to be a "conveyance or assignment" within the meaning of the subsection, as it is the common practice of conveyancers to make a declaration of trust of leaseholds, instead of assigning them to trustees The words mean an assignment which is not limited to any particular creditors, *e g*, the trade creditors only (*In re Phillips, Ex p Barton*, 1900, 2 Q B 329) The fact that a deed of assignment is unstamped and not registered under the Deeds of Arrangement Act, 1887, s 5, does not prevent its being given in evidence for the purpose of proving an act of bankruptcy (*In re Hollinshead, Ex parte Heapy*, 1889, 6 Mor 66)

Who may rely on this act of bankruptcy The act of bankruptcy defined by this section cannot be relied upon by every creditor Thus, a creditor who is party to the deed cannot rely upon it as an act of bankruptcy (*Bamford v Baron*, 1788, 2 T R 594, *Ex p Stray*, 1867, L R 2 Ch 374, *Ex p Taylor*, 1906, 1 K B 377, *In re Mills*, 1906, 1 K B 389) Nevertheless if the assent of a creditor to the deed has been obtained by fraud on the part of the bankrupt (*In re Tanenberg, Ex p Perrier*, 1889, 6 Mor 649), or if the deed contains any provision which gives an advantage to one creditor over the others (*Ex p Marshall*, 1841, 1 M D and D 575), it may be relied on as an act of bankruptcy by the creditors who are unfairly treated A creditor who is not bound by the deed is entitled to present a bankruptcy petition against the debtor founded on another act of bankruptcy, although the result may be that the deed will be avoided as against the trustee in the debtor's bankruptcy *In re Mills, ubi supra*

(b) FRAUDULENT ASSIGNMENT OF PROPERTY OR PART THEREOF
If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof

The first question which is likely to suggest itself on reading this definition of the second act of bankruptcy is, "Why should a fraudulent transfer of property be an act of bankruptcy?"

ACTS OF BANKRUPTCY (*cont.*), (*index*, p 9)

Unless it is fraudulent in the sense that it is calculated to delay or defeat creditors, there is no very obvious reason why any creditor should be entitled to go to the court and say, "My debtor has assigned his property, and by doing so has put it out of his power to pay me. Therefore I want to have him made a bankrupt." The fact is, of course, that the word "fraudulent" as used in the section means fraudulent as against the creditors. Fraudulent dispositions of property within the meaning of this section may be thus divided —

(1) Assignments fraudulent at common law or under 13 Eliz., c 5

(11) Assignments either (a) of the whole or (b) of part of a debtor's property, which are made fraudulent by bankruptcy law

(1) Assignments fraudulent at common law or under the 13 Eliz. c 5. The statute of Elizabeth, which is really only declaratory of the common law (see *per* Lord Mansfield in *Cadogan v Kennell*, Cowp 434, see also *In re Lane-Fox*, 1900, 2 Q B 509, *In re Holland*, 1902, 2 Ch 360), evinced a desire on the part of the legislature to suppress fraudulent transfers of property. That act, which was passed "for the avoyding and abolysshing of faigned, covenous, and fraudulent . gyftes, grauntes, and conveyances as well of landes and tenementes as of goodes and catels," recited that such gifts, etc., had theretofore been devised for the purpose of delaying and hindering and defrauding creditors, and declared that "every feoffment, etc., of lands, tenements, hereditaments, goods and chattels, or any of them and every bond, suit, judgment, and execution, made for any intent or purpose before expressed and declared, shall be against that person, his heirs, executors, administrators, and assigns, whose actions, suits, etc., are or might be by such fraudulent proceedings in any wise disturbed, hindered, delayed, or avoided, utterly void."

The evil against which this old statute was directed can best be explained by a simple illustration. Supposing a trader, who is carrying on an extensive business in his own name, secretly assigns the whole concern, (lock, stock, and barrel,) to A, but still continues

ACTS OF BANKRUPTCY (*cont*), (*index*, p 9)

to carry on the business ostensibly in his own interest One day the trader gets into difficulties, and on being sued says, "I have no money, no property, all that you see belongs to A" He then produces an assignment to A According to the law as declared by the statute above set out, the court would be entitled to declare the assignment fraudulent and void The Act does not extend to conveyances and assurances which are made *bonâ fide* and for good consideration, the law presuming in such cases that the debtor's estate will have received a sufficient *quid pro quo* which will be available for the creditors (See generally as to fraudulent assignments of this class *Twyne's case*, 1601, 1 Sm L C 11th Edn, p 1)

(ii) **Assignments made fraudulent by bankrupt law** This is one of the most important of the acts of bankruptcy which we shall have to consider It will be convenient to discuss the meaning of certain phrases which it contains

"*In England or elsewhere*" These words must not be taken to imply that if a debtor makes a fraudulent conveyance of any of his property anywhere, he commits an act of bankruptcy. Inasmuch as execution can only be levied on property at home, the conveyance or assignment of property situated abroad will not tend to defeat or delay creditors That is the mischief against which the section is directed Nevertheless, a fraudulent conveyance of English property may be made "elsewhere" than in England, if it is to operate according to English law (See *Ex p Crispin*, 1873, L R 8 Ch 374)

"*Fraudulent conveyance, gift, delivery, or transfer of his property*" There have been so many cases dealing with the meaning of these words, that it would be impossible to deal with them all in the compass of this work The following principles may, however, be deduced —

The assignment of the *whole* of a debtor's property *for the benefit of one or more creditors*, to the exclusion of others, is fraudulent, inasmuch as such an assignment must defraud the excluded creditors *Worsley v De Mattos*, 1758, 1 Burr 467 But for a man to sell (*Rose v Haycock*, 1834, 1 A and E 460) or mortgage

ACTS OF BANKRUPTCY (*cont*), (*index*, p 9)

all his property for a good consideration, is not fraudulent, for the simple reason that the creditors do not lose their security by such a transaction

Mortgages or assignments • Further, an assignment by a trader, of all his property and effects for a present advance of part of their value is not necessarily an act of bankruptcy (*Pennell v Reynolds*, 1861, 11 C B N S 713, *Lomax v Buxton*, 1871, L R 6 C P 107) The true test of the validity of such a transaction is, Was the fresh advance to enable the debtor to continue his business, and had the lender grounds for believing that it would enable the borrower to do so? (*Ex p Johnson*, *In re Chapman*, 1884, 26 Ch D 338 *Administrator of Jamaica v Lascelles de Mercado & Co*, 1894, A C 135) *In Ex p Chaplin*, *In re Sinclair*, 1884, 26 Ch. D 319, a trader who was in difficulties secretly assigned practically the whole of his property, the real consideration being the release by the assignor of a past debt, and a verbal agreement by him to pay the assignee's debts It was held that the assignment was an act of bankruptcy "If persons will take from a man who is in difficulties a deed of this description, which has the effect of withdrawing, and is intended to withdraw, all the property of the debtor from the legal process which his creditors have a right to enforce against him, and bankruptcy ensues, the deed is void under the bankruptcy law It is fraudulent as well as void, whatever may have been the view of those engaged in the transaction, that it might have been the best thing for the debtor, or that it might afford an effectual way of paying the creditors" (see also *In re Hirth*, *Ex p the Trustee*, 1899, 1 Q B 612, *In re Slobodinsky*, *Ex p Moore*, 1903, 2 K B 517) An assignment of a person's whole property for a *bond fide* advance is not an act of bankruptcy, although exorbitant interest is charged, and stringent conditions imposed (*Harrison v Cohen*, 1875, 32 L T 717)

As a general rule, the advance and the assignment must be contemporaneous, but a sum of money advanced upon the faith of an unconditional promise to give a bill of sale will be treated as an advance made in consideration of the bill of sale (*Harris v Rickett*, 1869, 4 H and N 1)

Relation between amount of debt and value of property assigned :

ACTS OF BANKRUPTCY (*cont*), (*index* p 9)

The fact that the debt is much less than the value of the property which is advanced to secure it, does not prevent the assignment from operating as an act of bankruptcy. The effect of such a transaction may be to put the property assigned out of reach of the bankrupt's creditors (*Smith v Cannan*, 1852, 22 L J Q B 290). Nevertheless such disproportion does not necessarily make the assignment an act of bankruptcy (*Hutton v Cruttwell*, 1852, 22 L J Q B 73)

A colourable exception of part of a debtor's property will not save an assignment which practically covers his whole property from being an act of bankruptcy (*Worsley v De Mattos*, 1758, 1 Burr 467), the true test being 'Will the assignment, if acted on, notwithstanding the exception, produce insolvency?' (*Young v Waud*, 1852, 8 Ex 221)

Proof of fraudulent intention In considering whether an assignment is fraudulent or not, within the meaning of the subsection, it will be material to consider whether it is an assignment of the whole or a part of the debtor's property. Where the whole of a man's property is assigned, fraudulent intention is assumed as a matter of law, whereas if only a part is assigned, the person who is relying upon the assignment must prove fraud in fact.

Assignment of part of debtor's property Assignments of part of a debtor's property mostly consist of fraudulent preferences. Debtors who make this kind of assignment are much more numerous than those who assign all their property. It has been laid down, however, that such an assignment is fraudulent when made in contemplation of bankruptcy and with a view to preferring particular creditors (*Devon v Watts*, 1779, 1 Doug 88, *Edwards v Glyn*, 1859, 28 L J Q B 350, *Bills v Smith*, 1865, 34 L J Q B 68)

Effect of defective deed A deed may be an act of bankruptcy although it is imperfectly executed (*Ex p Snowball, In re Douglas*, 1872, L R 7 Ch 534) or revocable (*Brittain v Brown*, 1871, 24 L T 504). As already indicated, the want of a stamp will not prevent a deed being given in evidence as an act of bankruptcy (see p 11, *supra*)

ACTS OF BANKRUPTCY (*cont*), (*index*, p 9)

(c) FRAUDULENT PREFERENCE *If in England or elsewhere he makes any conveyance or transfer of his property, or any part thereof, or creates any charge thereon which would, under this or any other Act, be void as a fraudulent preference if he were adjudged bankrupt*

(See Fraudulent Preference)

(d) DEPARTING FROM OR REMAINING OUT OF ENGLAND *If, with intent to defeat or delay his creditors, he does any of the following things—namely, departs out of England, or being out of England, remains out of England, or departs from his dwelling house, or otherwise absents himself, or begins to keep house*

(i) Generally · This act of bankruptcy is to be distinguished from those already considered by reason of the fact that the person relying upon it must prove the intent to defeat or delay creditors. The fraudulent intention is in other cases inferred from the act itself. Where, however, a debtor knows that the necessary consequence of his going abroad will be to defeat or delay certain creditors, he will be held to have gone abroad with that intention (*Ex p Goater, In re Funney*, 1874, 30 L T 620), although there has been no actual delay of any creditor (*Williams v Numm*, 1809, 1 Taunt 270, *Rouch v Great Western Railway Co*, 1841 1 Q B 51)

(ii) Proof of intent essential As was said by Bacon, C J, in *Ex p Coates*, 1877, 5 Ch D 979, "It is the very gist and essence of the Bankruptcy Act, that creditors who claim the benefit of these severe and almost criminal provisions of the law cannot have that benefit unless they strictly comply with the terms of the Act. The fact of the debtor having departed from his dwelling house in itself announces nothing. He may have gone to bury his wife, or to a meet of foxhounds." In that case the petition was dismissed because it did not allege the intent.

Everything depends upon the intention with which a debtor departs out of England. Thus the action of a domiciled Englishman in leaving England after the service of a writ would be much more suspicious than that of a foreigner leaving England to return to his own country (*Ex p Crispin*, 1873, L R 8 Ch 374). Similarly, where a domiciled Englishman had his permanent home abroad,

ACTS OF BANKRUPTCY (*cont*), (*index*, p 9)

no intent to defeat or delay can be inferred from his remaining abroad (*Ex p. Brandon, In re Trench*, 1884, 25 Ch D 500)

(iii) Meaning of "absenting" Absenting, unless it be from the place of abode or place of business, or to avoid a creditor, is not an act of bankruptcy (*Bernasconi v Farebrother*, 1830, 10 B & C 549). The mere fact that a trader fails to keep a promise that he will call and pay at a specified time is not sufficient evidence of "absenting," unless there is intent (*Ex p Meyer, In re Stephany*, 1871, L R 7 Ch 188) As to the meaning of the words "otherwise absenting himself," see *Bayley v Schofield*, 1813, 1 M & S 338 A debtor absents himself if he makes it difficult for creditors to ascertain his whereabouts by secretly changing his abode and assuming an *alias* (*In re Alderson, Ex p Jackson*, 1895, 1 Q B 183)

(iv) "Keeping house" With regard to "keeping house," it would be sufficient to show that the debtor had given orders that he was to be denied to creditors or others, and that a creditor was in consequence denied But a creditor could not say he was denied if the debtor refused to see him at an unreasonable hour (*Ex p Hall*, 1 Atk 202)

(e) ALLOWING GOODS TO REMAIN IN SHERIFF'S HANDS FOR TWENTY-ONE DAYS *A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days*

Provided that where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which the summons is taken out and the date at which the sheriff is ordered to withdraw, or any interpleader issue ordered thereon is finally disposed of, shall not be taken into account in calculating such period of twenty-one days (B A 1890. s 1)

(1) Generally This act of bankruptcy appears to merit a few words of explanation It is obvious that if a debtor is in such financial straits that he must allow himself to be "sold up" in order to satisfy a debt, he proclaims his insolvency to the world.

ACTS OF BANKRUPTCY (*cont*), (*infra*, p 9)

If his goods are seized by the sheriff, it is an act of bankruptcy to allow the sheriff to hold the goods for twenty-one days. Sometimes when the sheriff seizes, there is a dispute as to whether the goods really belong to the debtor. In these circumstances there are what are termed "interpleader" proceedings, that is to say, the court may be asked to say in whom the title to the goods really vests.

In reckoning the period of twenty-one days, the day on which the sheriff takes possession is not to be considered (*Ex p Hashick, In re North*, 1895, 2 Q B 264). There is no repetition of the act of bankruptcy at the expiration of each such period, a separate seizure being necessary (*In re Beeston*, 1899, 1 Q B 626).

(u) What is a "sale"? It is doubtful whether a private sale of the goods by the debtor to the creditor, after seizure by the sheriff, constitutes a seizure and sale within this section (see *per Mellish, L J*, in *Ex p Pearson, In re Mortimer*, 1873, L R 8 Ch 667). It seems, however, that a private sale by the sheriff to the execution creditor would constitute an act of bankruptcy (*Ex p Villars, In re Rogers*, 1874, L R 9 Ch 432) in spite of s 145 (*q v p* 294). It is to be observed that the sale need not be by the sheriff. It is sufficient, however, if the sheriff seizes the goods and they are sold by the debtor to the creditor, who re-sells them (*c f Ex p Pearson, In re Mortimer, supra*, which was decided under the B A, 1869). (See *Execution Creditor*, and *Sheriff*.)

(f) *If he files in the court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself*

(i) Generally. This act of bankruptcy is not to be confused with that mentioned below (see *par (h) infra*). It is obvious that if a debtor files a declaration of his inability to pay his debts he gives notice to persons who are likely to deal with him that he is insolvent. A declaration must, according to Rule 135, be witnessed either by a solicitor, justice of the peace, an official receiver, or registrar of the court. The filing of the declaration is complete when it is delivered to the proper officer with intent that it shall be duly filed (*Ransford v Maule*, 1873, L. R 8 C. P 672).

ACTS OF BANKRUPTCY (*cont*), (*index*, p 9)

although he has equitably assigned his judgment (*In re Palmer, Ex p Brims*, 1898, 1 Q B 419) Any creditor may found a petition on this act of bankruptcy, the right not being limited to the creditor who issued the bankruptcy notice (*Ex p Dearle, In re Hastings*, 1884, 14 Q B D 184) The liquidator of a company must issue a notice in the name of the company (*Companies Act*, 1862, s 95)

(ii) Effect of section Stated quite shortly, the effect of this section is that if a man has had a judgment obtained against him for any sum which he cannot pay, he may be made bankrupt, unless he satisfy the court that he has a counterclaim which equals or exceeds the amount of the judgment debt

(iii) "Final judgment" A "final judgment" is any judgment upon which the creditor may issue execution (*Ex p Woodall*, 1884, 13 Q B D 479) It may be mentioned that execution in this connection means the seizure and sale of a man's furniture and effects in order to satisfy the judgment debt The words are construed strictly, so that no bankruptcy notice can be founded upon a consent order to pay taxed costs in an action for specific performance (*Ex p Schmitz, In re Cohen*, 1884, 12 Q B D 509), nor upon an order dismissing an action for want of prosecution, and payment of costs by plaintiff (*In re Riddell, Ex p the Earl of Strathmore*, 1888, 20 Q B D 512), nor upon an order made under s 12 of the Arbitration Act, 1889, enforcing an award (*In re a Judgment Debtor*, 1907, 23 T L R 215) "To constitute an order a final judgment, nothing more is necessary than that there should be a proper *litis contestatio* and a final adjudication of it between the parties" (*per* Lord Esher in *In re Riddell, Ex p Earl of Strathmore*, 1888, 20 Q B D 512, 514), and where an order for the payment of money forms part of a judgment, which is in itself final, it is not possible to divide the judgment into two parts, and say that the one part is and that the other is not final (*Ex p Moore, In re Faithfull*, 1885, 14 Q B D 627) Thus in an action for dissolution of partnership, an order was made for dissolution and enquiry as to the division of property It was also ordered that the defendant should pay the plaintiffs' taxed costs This was held to be a final judgment (*In re Alexander*, 1892, 1 Q B 216) Where the creditor issues execution for the judgment debt without

ACTS OF BANKRUPTCY (*cont*), (*index*, p 9)

costs, this is a final judgment, having regard to Or 42, r 18 of the Rules of the Supreme Court (*In re G J*, *Ex p O R*, 1905, 2 K B 678)

(iv) What is a stay of execution . In effect, a stay of execution serves to raise the question whether the amount of the judgment debt is really due That is why a stay operates to prevent the issue of a bankruptcy notice It often happens that when the sheriff makes a levy for the purposes of an execution, a third person comes forward and claims that the goods are his property In such a case the sheriff must interplead Where goods taken in execution are claimed by a third party, and an interpleader order is made, under which the sheriff withdraws, "execution has been stayed," and a notice cannot issue (*Ex p Ford*, 1886, 18 Q B D 369) Nor can a notice be served when an interpleader summons is pending (*In re Fellows*, 1895, 2 Q B 521), (but see *In re a Debtor*, *Ex p Smith*, 1902, 2 K B 260) A garnishee order *msi* obtained by a judgment creditor is not a stay of execution so as to prevent the issue of a valid bankruptcy notice (*In re H B*, 1904, 1 K B , 94 See also *In re Coman*, *Ex p Hyde*, 1888, 20 Q B D 690)

(v) Valid bankruptcy notice . A notice may only issue for the amount for which the creditor is entitled to issue execution (*In re Child*, 1892, 2 Q B 77, *In re Fellows*, 1895, 2 Q B 521) Two judgments cannot be included in one notice (*In re Low*, *Ex p Central Argentine Goldfields Co*, 1891, 1 Q B 147), and if two judgments are included, the court will not allow the notice to be amended by striking out one judgment (*In re a Debtor*, 1907, 23 T L R 169) If the judgment is against several persons jointly, a notice may issue against one of the judgment debtors without including the others (*In re Low*, *Ex p Gibson*, 1895, 1 Q B 734) (As to the issue of a notice on a judgment debt for which a bill has been accepted, see *In re a Debtor*, 1908, 1 K B 344) See further, *Bankruptcy Notice*, as to time for serving notice, see *Time*

(vi) Against whom a bankruptcy notice may issue A notice cannot be issued against a married woman on a judgment recovered against her separate estate (*Ex p. Lester*, *In re Lynes*, 1893, 2 Q B 113), nor can a notice be issued against an infant (*In re Beauchamp Bros*, 1894, 1 Q B 1) A notice may be served on a partnership firm

ACTS OF BANKRUPTCY (*cont*), (*index*, p 9)

in the firm's name, having regard to s 115 of the B A , 1883 (*q v post*, p 216) (As to a firm which has been dissolved, see *In re Wenham, Ex p Ballams*, 1900, 2 Q B , 698)

(vu) Forms relating to bankruptcy notices.

Request for Issue of Bankruptcy Notice —(No 5)

In the [High Court of Justice]
In bankruptcy

1 I, C D , of , hereby request that a bankruptcy notice be issued by this Court against [*here insert name, description, and address of judgment debtor*]

2 The said A B has for the greater part of the past six months resided at [or carried on business at] within the district of this Court [*or, as the case may be, following the terms of section 95 of the Act*]

3 I produce an office copy of a final judgment against the said A B obtained by [me] in the Court on the day of

4 Execution on the said judgment has not been stayed

Dated this day of 188
C D , judgment creditor
or,
[E F , solicitor for the judgment creditor]

NOTE —Where the debtor resides at a place other than his place of business, both addresses should be inserted

Bankruptcy Notice (No 6)

To A B [or A B & Co] of (Title)

Take notice that within [*seven*] days after service of this notice on you, excluding the day of such service, you must pay to C D , of , the sum of £ claimed by him as being the amount due on a final judgment obtained by him against you in the Court, dated , whereon execution has not been stayed, or you must secure or compound for the said sum to [his] satisfaction or the satisfaction of the Court , or you must satisfy the Court that you have a counter-claim, set-off, or cross demand against C D which equals or exceeds the sum claimed by him, and which you could not set up in the action in which the judgment was obtained

Dated this day of 188
By the Court,
Registrar

Indorsement of Notice

You are specially to note,—

That the consequences of not complying with the requisitions of this notice are that you will have committed an act of bankruptcy, on which bankruptcy proceedings may be taken against you

If, however, you have a counter-claim, set-off, or cross demand which

ACTS OF BANKRUPTCY (*cont.*), (*infra*, p 9)

equals or exceeds the amount claimed by C D in respect of the judgment, and which you could not set up in the action in which the said judgment was obtained you must within days apply to the Court to set aside this notice by filing with the Registrar an affidavit to the above effect

[Name and address of solicitor suing out the notice] or

This notice is sued out by [C D] in person

(h) NOTICE OF INTENTION TO SUSPEND PAYMENT *If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts*

A declaration of inability to pay debts may amount to an act of bankruptcy under this subsection (*Crook v Morley*, 1891, A C 316) The notice need not be a notice of permanent stoppage of payment for a notice of temporary suspension of payments *de facto*, whether in circumstances which might make it possible to resume them, or in circumstances which might make that impossible is sufficient to constitute an act of bankruptcy (*ib. per* Lord Selborne, at p 319) Each of the following announcements has been held to amount to an act of bankruptcy "Being unable to meet my engagements as they fall due I invite your attendance at the Guildhall Tavern on Wednesday next at 3 p.m., when I will submit a statement of my position for your consideration and decision" (*Crook v Morley, supra*) "I am sorry to inform you that from my losses I find myself in difficulties I therefore consider it my best plan to call a meeting of my creditors

Hoping for your forbearance" (*In re Selwood, Ex p Dash*, 1894, 1 Mans 66) On the other hand, it was held not to be an act of bankruptcy where the debtor's solicitors wrote "We think it well to repeat what we stated to you at our interview, that a receiving order will be applied for immediately execution is issued" (*Hill's Trustee v Rowlands*, 1896, 2 Q B 124) A notice under this section may be given orally (*Ex p Nickoll, In re Walker*, 1884, 13 Q B D 469) to a single creditor, but it must be one that means that the debtor intends to deal with his creditors collectively, and not merely with one or more individuals (*In re Scott*, 1896, 1 Q B 619)

(i) UNDER S 5 OF THE DEBTORS ACT, 1869 Where under s 5 of the Debtors Act, 1869, application is made by a judgment creditor to a court for the committal of a judgment debtor, the court may decline to commit, and may make a receiving order In such a case

ACTS OF BANKRUPTCY (*cont.*), (*index*, p 9).

the judgment debtor is deemed to have committed an act of bankruptcy (B A , 1883, s 103 (5) , see *Receiving Order*, p 266).

ADJOURNMENT.

The court has general power to adjourn bankruptcy proceedings on terms (B A , 1883, s 105) A public examination (see Rs 187-189) , an application for adjudication (*In re Thimlow*, 1895, 1 Q B 724) , and a meeting of creditors (see *Meetings of Creditors*, p 194) may be adjourned As to adjournment of petition, see *Petition*, p 224

ADJUDICATION (and see Annulment of Adjudication).

- (i) *Generally*
- (ii) *Adjournment of application*
- (iii) *Notice to debtor*
- (iv) *Where debtor has absconded*
- (v) *On failure to make out statement of affairs*
- (vi) *Adjudication on application of debtor*
- (vii) *Notice and application of debtor*
- (viii) *Forms relating to order of adjudication*
- (ix) *References to other forms*

(i) *Generally* . Where a receiving order is made against a debtor, then—(a) If the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt , or (b) If they pass no resolution , or (c) If the creditors do not meet , or (d) If a composition or scheme is not accepted or approved in pursuance of the B A , 1883, within fourteen days after the conclusion of the examination of the debtor, or such further time as the court may allow, the court must adjudge the debtor bankrupt Upon such adjudication the property of the bankrupt becomes divisible amongst his creditors and vests in a trustee (B A , 1883, s 20 (1))

As to the right of a landlord to rent due after adjudication, see *Landlord and Tenant*, p 186

As to the resolutions which may be passed where adjudication is resolved on, see *Meetings of Creditors* (F. No 87), p 194

ADJUDICATION (*cont*), (*index*, p 24)

(ii) **Adjournment of application:** On application made, the court must make the order, unless good reason is shown for an adjournment (*In re Thurlow, Ex p O R*, 1895, 1 Q B 724) The official receiver may appeal against the refusal or adjournment of an application for adjudication made by him (*Ex p O R, In re Reed, Bowen & Co*, 1887, 19 Q B D 174)

(iii) **Notice to debtor** Notice of intention to apply for an order of adjudication should, as a general rule, be given to the bankrupt, though such notice is not necessary (*In re Ponsford*, 1904, 2 K B 704)

(iv) **Where debtor has absconded** When the official receiver satisfies the court that the debtor has absconded, or that the debtor does not intend to propose a composition or scheme, the court may, on the application of a creditor or of the official receiver make an order of adjudication (B R 191)

(v) **On failure to make out statement of affairs** The court has power under s 16 (3) of the B A, 1883, to make an order of adjudication against a debtor who fails to make out his statement of affairs in proper time

(vi) **Adjudication on application of debtor:** At the time of making the receiving order, the court may, on the application of the debtor himself, adjudge him bankrupt Such an application may be made orally and without notice (B R 190)

(vii) **Notice and date of adjudication** Notice of every order of adjudication, stating the name, address, and description of the bankrupt, the date of the adjudication, and the name of the court by which the adjudication is made, must be gazetted and advertised in a local paper The date of the order is, for the purposes of the Bankruptcy Act, the date of adjudication (B A, 1883, s 20 (2))

(viii) Forms relating to adjudication

(a) *Form of Application for Adjudication after Resolution for Bankruptcy*
(No 52) (*Title*)

The official receiver of the estate of the above-named debtor hereby reports to the Court —

That at the first meeting of the creditors of the said debtor, held at _____, on the _____ day of _____, 188____, the following resolution was passed —

ADJUDICATION (*cont*), (*index*, p 24).

"That , the above-named debtor, shall be adjudged bankrupt, and that the official receiver do apply to the Court to make the adjudication "

(a) [*"That the debtor has, in writing, consented to be adjudged bankrupt"*]

And the official receiver, accordingly, in pursuance of the provisions of section 20 of the Bankruptcy Act, 1883, makes application to the Court to adjudge the said debtor bankrupt

Dated this day of 188

Official Receiver

(b) *Form of Notice to Debtor of Intended Application for Adjudication*
(No 49) (*Title*)

Take notice that, on behalf of the official receiver, application will be made to the Court sitting in bankruptcy, at on day, the day of 188 , at o'clock in the noon for an Order adjudging you, the above-named bankrupt

[*Here state the grounds on which the application will be made*]

And further take notice, that leave has been obtained to serve you with short notice of this application

Dated this day of 188

To the above-named

(c) *Form of Order of Adjudication* (No 55)
(*Title*)

Pursuant to a petition, dated against [*here insert name, description, and address of debtor*] on which a receiving order was made, on the [*date*], and on the application of [*here insert "the official receiver" or "the debtor himself," or A B of a creditor*], and on reading and hearing it is ordered that the debtor be and the said debtor is hereby adjudged bankrupt

Dated this day of 188

By the Court,
Registrar

Or,

Whereas, pursuant to a petition dated against *A B*, a receiving order was made on the [*date*] And whereas it appears to the Court that at the first meeting of creditors held on the [*date*], (or at an adjournment of the first meeting of creditors) at , it was duly resolved that the debtor be adjudged bankrupt

It is ordered that the debtor be and the said debtor is hereby adjudged bankrupt

Dated this day of 188

By the Court,
Registrar

(ix) References to other forms See also the following forms appended to the Bankruptcy Rules No 51, *Application for Adjudication under s 16 and R 191*, No 53, *Application for Adjudication, no quorum, summary administration*, No 54, *Application for Adjudication where no quorum at adjourned meeting*, No 55 A, *Order of Adjudication after Receiving Order under s 103 of the B A, 1883*

ADJUDICATION (*cont*)

Cross references As to composition or scheme before and after adjudication, see *Composition or Scheme of Arrangement*, p 78

ADMINISTRATION ORDERS.

- (i) *Generally*
- (ii) *Creditors subsequent to the order.*
- (iii) *Execution to enforce administration*, p 28
- (iv) *Remedies of creditors*
- (v) *Default by debtor*
- (vi) *Priority of payments.*
- (vii) *Discharge of debtor*
- (viii) *Index to rules*

(i) **Generally** Where judgment has been obtained in the County Court, and the debtor is unable to pay the amount forthwith, and alleges that his whole indebtedness amounts to a sum not exceeding £50, the County Court may order the estate to be administered and provide for the payment of the debts by instalments or otherwise, either in full or to such an extent as the court thinks practicable, and subject to any conditions as to future earnings or income which the court may think just (B A , 1883, s 122 (1)) The order is not made invalid by the debts being in fact found to exceed £50, but in that case the court may set aside the order (*ib* (2)) The County Court judge has power to transfer the proceedings to another court (*ib* (3)) Notice of the order is sent to each creditor (*ib* (9)), and any creditor, on proof of his debt before the registrar, may be scheduled as a creditor to the amount of his proof (*ib* (10))

Any creditor may in the prescribed manner object to any debt scheduled, or to the manner in which payment is directed to be made by instalments (*ib* (11))

(ii) **Creditors subsequent to the order** Any person who after the date of the order becomes a creditor of the debtor, shall, on proof of his debt before the registrar, be scheduled as a creditor of the debtor for the amount of his proof, but shall not be entitled to any dividend under the order until those creditors who are scheduled as having been creditors before the date of the order have been paid to the extent provided by the order (*ib* (12))

AFTER-ACQUIRED PROPERTY (*cont*)

As to whether an agreement to assign after-acquired property constitutes the assignee a secured creditor, see *Secured Creditor*, p 288

AGENDA AT CREDITORS' MEETING (See *Meetings of Creditors*)
AGENT.

The agent of a bankrupt must surrender the bankrupt's property to the trustee on pain of committal for contempt (see *Trustee*, p. 334). Property held by a man as agent or factor cannot be seized in his bankruptcy (see *Property not Divisible amongst Creditors*, p 250)

ALIEN (and see *Abroad ; Foreigner , Petition , Bankrupt*)

An alien may present a petition if he can sue for the debt (see *Petition*, p 219)

ALIMONY.

Instalments of alimony accruing due before receiving order are not provable in the husband's bankruptcy (*Kerr v. Kerr*, 1897, 2 Q B 439)

ALLOWANCE TO BANKRUPT.

In certain circumstances an allowance for maintenance may be made to a bankrupt (see *Trustee*, p 333 , and see Rs 296, 325)

AMENDMENT

The court has general power to amend any written process or proceeding (B A , 1883, s 105 , Rs 207, 350 , and see *Court*) As to amendment of a proposal for a composition or scheme, see *Composition or Scheme of Arrangement*, p 80 , and as to amendment of valuation by a secured creditor, see *Secured Creditor*, p 291

ANNUAL REPORT OF TRUSTEE

Every trustee in a bankruptcy must from time to time, as may be prescribed, and not less than once in every year during the continuance of the bankruptcy, transmit to the Board a statement showing the proceedings in the bankruptcy up to the date of the statement, containing the prescribed particulars, and made out in the prescribed form (B A , 1883, s 81 (1))

The Board must cause the statements to be examined, and call the trustee to account for any misfeasance, neglect, or omission which may appear on the said statements or in his accounts or

ANNUAL REPORT OF TRUSTEE (*cont*)

otherwise, and may require the trustee to make good any loss which the estate of the bankrupt may have sustained by the misfeasance, neglect, or omission (*ib* ss (2)) It appears that accounts furnished in accordance with R 289 constitute a sufficient compliance with this section (see *Accounts of Trustee*, p 6).

ANNUITY.

One who is entitled to claim an annuity from a bankrupt, may prove in the bankruptcy (see *Debts Provable in Bankruptcy*, p 106)

As to how far an annuity belonging to a bankrupt is divisible amongst the creditors, see *Property Divisible amongst Creditors*, p 243

ANNULMENT OF ADJUDICATION. (See also *Adjudication*, as to annulment of composition see *Composition or Scheme of Arrangement*, p 86)

- (a) *Power for court to annul in certain cases.*
- (b) *Discretion of the court*
- (c) *Effect of annulment*
- (d) *Practice and procedure as to annulment*

(a) **POWER FOR COURT TO ANNUL IN CERTAIN CASES** Where in the opinion of the court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full, the court may, on the application of any person interested, annul the adjudication (B. A , 1883, s 35 (1))

The court also has power to annul a receiving order where it is more convenient to proceed under Scotch or Irish law (B A , 1883, s 14) Again, where there is a composition or scheme after adjudication, the court may annul the adjudication (B A , 1883, s 23 (2)) (See *Composition or Scheme of Arrangement*, p 89.)

“**Payment in full.**”—A debt disputed by a debtor is considered as paid in full, if the debtor enters into a bond, in such sum and with such sureties as the court approves, to pay the amount to be recovered in any proceeding for the recovery of or concerning the debt, with costs, and any debt due to a creditor who cannot be found or cannot be identified, shall be considered as paid in full if paid into court (B A , 1883, s 36).

ANNULMENT OF ADJUDICATION (*cont*), (*index*, p 31)

What "debts" are included. The "debts" referred to in this section are debts which have been rightly admitted to proof (*In re Keel*, 1905, 2 K B 666) Where some of the debts have been released, it cannot be said that the bankrupt has paid in full within the meaning of the section (*ib*)

In *In re Burnett, Ex p O R*, 1894, 1 Mans 89, a friend of the bankrupt bought up all the debts for less than 2s in the pound, and assigned them at their full value to a third person on the bankrupt's behalf It was held in this case that the debts had not been paid in full

(b) DISCRETION OF THE COURT It has been held that there is no power to annul a bankruptcy outside the provisions of the Act, so that where a bankrupt was discharged upon paying 7s 6d in the £, the order of discharge was overruled on appeal (*In re Gyll, Ex p B T*, 1888, 58 L J, Q B 8)

Where debtor files his own petition Where a debtor files his own petition, the proceedings in bankruptcy ought not to be stopped merely on the ground that his object is to escape the effect of an order against him under the Debtors Act (*In re Pamter*, 1895, 1 Q B 85) In that case a creditor having obtained judgment for £294 against a debtor possessed of an inalienable pension, took out a judgment summons against him for the payment of the debt by instalments The debtor, with the intention of evading such proceedings, filed his petition in bankruptcy The creditor was practically the sole creditor, and the assets were under £12 The debtor having been adjudicated bankrupt, it was held that the presentation of the petition was not such an abuse of the process of the court as to entitle the court to annul the adjudication Vaughan Williams, J, said (at p 91) "I have come to the conclusion that we are not entitled to annul an adjudication made on a debtor's petition merely because the debtor has no assets, nor because he is possessed of an inalienable pension, nor because, having no assets and being in possession of such a pension, he has presented his petition for the express purpose of preventing the application of the Debtors Act, to compel him to pay this debt out of his pension" This case was followed in *In re Archer* (1904, 20 T L R 390), where a debtor who had had a judgment against him for £100

ANNULMENT OF ADJUDICATION (*cont*), (*index*, p 31)

for breach of promise filed his petition. It was held that the petition not being an abuse of the process of the court, it would not be set aside. Where, however, it appears that a debtor makes a practice of presenting petitions, it seems that the court will interfere. Thus in *In re Betts* (1901, 2 K B 39) Wright, J, said at p 41, (after approving *Ex p Painter, supra*), "There must, however, be a limit to a debtor's immunity, and if it appears as a fact that a debtor is in the habit of filing bankruptcy petitions, so that the bankruptcy law is really being made use of in order to assist him in frauds on his creditors, and to enable him to get credit, while he all along has the intention of getting rid of his liabilities by filing his own petition, I cannot think that such a state of things comes within the protection of the bankruptcy law."

Where debtor guilty of offences: Where the debtor has been guilty of offences against the bankruptcy laws, annulment will probably be refused (*In re Taylor*, 1901, 1 K B 744) (See *Fraudulent Debtor*, p 169)

In that case the debts had been paid in full, but the court refused to annul, the debtor having falsified his statement of affairs and concealed his assets. (And see further *or* see further *In re Beer*, 1903, 1 K B 628, followed in *In re Sullivan & Hughes*, 1904, 20 T L R 393) So, in a case where a debtor went bankrupt with a view to paying his creditors in full—and such cases are not unknown—and so establishing his credit and integrity for evermore, the court might refuse to annul the adjudication if the true facts came to light.

Effect of consent of creditor The mere fact that the petitioning creditor consents does not entitle a debtor to have the adjudication annulled (*In re Flatau, Ex p O R*, 1893, 2 Q B 219)

(c) **EFFECT OF ANNULMENT** Where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the official receiver, trustee, or other person acting under their authority, or by the court, are valid, but the property of the debtor who was adjudged bankrupt vests in such person as the court may appoint, or in default of any such appointment reverts to the debtor for all his estate or interest

ANNULMENT OF ADJUDICATION (*cont*), (*indcv*, p 31)

therein on such terms and subject to such conditions, if any, as the court may declare by order (B A, 1883, s 35 (2))

The effect of an order of annulment is that, subject to any *bona fide* disposition lawfully made by the trustee prior to the annulling of the bankruptcy, and subject to any condition which the court annulling the bankruptcy may by its order impose, the party whose bankruptcy is set aside is remitted to his original situation (*per* Cockburn, C J, in *Bailey v Johnson*, 1872, L R 7 Ex 263) The order of annulment does not relieve the trustee from his duty to account to the Board of Trade for all transactions in connection with the estate (R 194 (3)) Where there is an annulment under s 23 (as to which, see p 89) the bankruptcy really continues in another form, and the bankrupt does not by such an order resume full power and control over his property (see *West v Baker* 1875, 1 Ex D 44, *Ex p Lennard*, *In re Chadley*, 1875, 1 Ch D 177)

The rejection of a proof by the trustee is valid after annulment, being an act theretofore done (*Brandon v McHenry*, 1891, 1 Q B 538) (As to effect of annulment on statute-barred debts, see *Statute of Limitations*, p 307 As to effect of annulment on rights of secured creditors, see *Secured Creditor*, p 291)

(d) PRACTICE AND PROCEDURE AS TO ANNULMENT Where an adjudication is annulled, notice is given by the registrar to the Board of Trade, in order that the annulment may be gazetted (R 194 (1)) Notice of an application for annulment must be served on the official receiver (R 134 (b))

Form of Application to annul Adjudication under Section 35 (No 56) (Title)

I, R S, of _____, being interested in this matter, do hereby make application to the Court that the order of adjudication against A B be annulled [*here state grounds of application*]

Dated this _____ day of _____ 188

R S

Form of Order annulling Adjudication under Section 35 (No 57) (Title)

On the application of R S, of _____, and on reading and hearing _____, it is ordered that the order of adjudication dated _____ against A B, of _____, be and the same is hereby annulled

Dated this _____ day of _____ 188

By the Court,
Registrar

ANNULMENT OF RECEIVING ORDER (See *Receiving Order*, p 263)

ANTECEDENT TRANSACTIONS

As to the effect of bankruptcy on certain antecedent transactions, see *Execution Creditor* , *Fraudulent Preference* , *Sheriff* , *Voluntary Settlement*

ANTE-NUPTIAL SETTLEMENT. (See *Voluntary Settlement*, p 339)

APPAREL, BEDDING, Etc

The clothes and bedding of a bankrupt, his wife and children, are not divisible amongst creditors (see *Property not Divisible amongst Creditors*, p 247)

APPARENT POSSESSION.

As to what goods are deemed to be in the apparent possession of a grantor of a bill of sale, see *Bills of Sale*, p 58

APPEAL (and see *Court*)

Generally : Every court having jurisdiction in bankruptcy may review, rescind, or vary any order made by it under its bankruptcy jurisdiction

Appeals from High Court An appeal lies from the High Court to the Court of Appeal , and from the Court of Appeal (by leave of that court) to the House of Lords (B A , 1883, s 104 , as to appeals to the House of Lords, see *Ex p Attwater*, 1877, 5 Ch D 27) There can be no appeal to the Court of Appeal (except by leave) from any order made by consent, or as to costs only, or relative to property or money's worth less than £50 (see R 129) Further, unless the time is specially extended, no appeal can be brought to the Court of Appeal after the expiration of twenty-one days from the order appealed from (R 130) A bankrupt may appeal from the refusal of the court to grant a certificate that bankruptcy has been caused by misfortune (see s 32) As to appeal from an order of discharge, see *Discharge of Bankrupt*, p 130 (As to costs of appeal see *Costs*, p 94 , and as to security for costs, see Rs 3, 131-134)

Appeal from County Court An appeal lies from the County Court to the Divisional Court, and from that court (by leave) to the Court of Appeal In such a case the decision of the Court of Appeal is final (*Bankruptcy Appeals (County Courts) Act*, 1884 s 2).

APPEAL (*cont*)

Appeals from Trustee A bankrupt or a creditor who is aggrieved (as to this word, see *Ex p Sidebotham*, 1879, 14 Ch D 458) by the act or decision of a trustee, may appeal (B A , 1883, s 90) Thus a creditor may appeal against an estimate of a contingent debt, or the rejection of a proof In the latter case the appeal must be brought within twenty-one days (R 230)

Appeals from Board of Trade An appeal to the High Court from the Board must be brought within twenty-one days (B A , 1883, s 139) Such an appeal lies (a) From refusal to release a trustee (s 82 (1)), (b) From removal of trustee (s 86 (2)), (c) From refusal to admit a claim on money paid in to the Bankruptcy Estates Account (s 162 (4)) An appeal from the Board is heard in court (R 6 (d))

Appeal from Official Receiver A creditor may appeal from the decision of the official receiver with regard to a proof prior to the appointment of the trustee (Act of 1883, Sch II, R 27) An appeal also lies from the decision of the chairman of a meeting as to a proof (Sch I, R 14)

Practice on appeals (See generally, Rs 129-134A , and R S C Or lvi, R 134)

APPORTIONMENT OF RENT (See Landlord and Tenant, p 187)

APPRENTICE OR ARTICLED CLERK

As to the position of an apprentice or articulated clerk whose employer becomes bankrupt, see *Priority of Debts*, p 234

APPROPRIATION

Questions sometimes arise as to whether money held by the bankrupt has been so appropriated as to be stamped with a trust which places it out of the reach of the bankrupt's creditors For the cases on this subject, see *Williams*, p 189, *et seq* As to the appropriation of a bankrupt's pay, etc , see *Realisation of Property*, p 260

ARBITRATION

As to power of trustee to refer dispute to arbitration, see *Trustee*, p 331 Bankruptcy does not revoke a submission to arbitration (*Hemsworth v Brian*, 1845, 1 C B 131)

ARRANGEMENT. (See Composition or Scheme of Arrangement)

ARREST OF DEBTOR. (See, generally, *Control over Person and Property of Debtor*, p 91)

As to the arrest of a debtor on non-compliance with a bankruptcy notice, see *Bankruptcy Notice*, p 48 A payment made by a debtor after his arrest may amount to a fraudulent preference (see *Fraudulent Preference*, p 177) As to an action for malicious arrest, see *Control of Person and Property of Debtor*, p 92

ARTICLED CLERK (See *Apprentice or Articled Clerk*)

ASSETS.

As to when assets are deemed to be worth 10s in the £, see *Discharge of Bankrupt*, p 126 Failure by a bankrupt to account for loss of assets may seriously affect his discharge (see *ib* , p 127)

ASSIGNEE.

The assignee of a debt may present a bankruptcy petition (see *Petition*, p 219) As to what amounts to an assignment, see *ib* p 219 As to how far an assignee of a bankrupt's property is a secured creditor, see *Secured Creditor*, p 288

ASSIGNMENT OF DEBTOR'S PROPERTY

Questions relating to assignment arise in relation to fraudulent disposition of property Thus an assignment of all a man's property to one creditor to the exclusion of others may be fraudulent and void (see *Voluntary Settlement*, p 338) But an assignment of the whole of a debtor's property for good consideration is not necessarily fraudulent (see *Acts of Bankruptcy*, p 15) An assignment for the benefit of creditors must be registered (see *Deeds of Arrangement*, p 118), and cannot be relied on as an act of bankruptcy by anyone who is party to the deed As to the validity of certain assignments made by the debtor after receiving order, see *Protected Transactions*, p 252 , as to what amounts to an assignment of a debt, see *Petition*, p 219 , and as to assignments in equity, see *Property not Divisible amongst Creditors*, p 242

ASSURANCE OF PERSONAL CHATTELS

An assurance of personal chattels may be a bill of sale, see *Bills of Sale*, pp 53, 54

ATTACHMENT.

If a creditor has completed the attachment of a debt by receiving the debt before the date of the receiving order and before notice

ATTACHMENT (*cont*)

of a petition, he can retain that debt against the trustee (see *Execution Creditor*, p 159) Dividends are not liable to attachment (see *Dividends*, p 149)

ATTESTATION

As to the attestation of a bill of sale, see *Bills of Sale*, p 67.

ATTORNMENT.

The attornment clause in a mortgage may be a bill of sale, see *Bills of Sale*, p 57

AUCTION, AUCTIONEER

Generally speaking, the goods of a debtor sold under execution must be sold by auction, but in certain cases private sale is allowed (see *Sheriff*, p 294) The employment of an auctioneer in connection with a bankrupt estate must be duly sanctioned, and his bill must be taxed (B A 1883, s 73)

AUCTIONEER'S CHARGES

These are fixed by the Bankruptcy Rules An auctioneer may charge —

For sales by auction, in addition to such out-of-pocket expenses as may be authorised at the time by the official receiver or trustee —

Of chattel property not exceeding —

	£	s	d	
On the first 500 <i>l</i>	5	0	0	per cent
Above up to 1,000 <i>l</i>	4	0	0	„
Above 1,000 <i>l</i>	2	10	0	„

Of estates, freehold, leasehold, etc, including prior valuations for determining amount of reserve bids —

	£	s	d	
On the first 300 <i>l</i>	5	0	0	per cent
On the next 1,600 <i>l</i>	2	10	0	„
Above up to 5,000 <i>l</i>	1	5	0	„
Above 5,000 <i>l</i>	1	0	0	„

No higher allowance to be sanctioned without the leave of the Board of Trade

Costs of surveys, dilapidations, and specifications in discretion of taxing officer	2	0	0
	to		
	5	0	0

AUDIT.

As to the audit of a trustee's accounts, see *Accounts of Trustee*, p. 6

AVAILABLE ACT OF BANKRUPTCY.

This means any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made (B. A. 1883. s. 168). As to the position of an execution creditor who has no notice. see *Execution Creditor* p. 158. (See also *Protected Transactions*. p. 252)

AVOIDANCE.

As to avoidance of a bill of sale. see *Bills of Sale* pp 57. 59. of a deed of arrangement. see *Deed of Arrangement* p. 119.

AWARD.

Where a party to arbitration proceedings becomes bankrupt before the award. the submission to arbitration is not thereby revoked (*In re Smith. Ex p. Edwards* 1886 3 Mor. 179). As to the effect of an award where the committee have not sanctioned the arbitration. see *Ex p. Wild*. 1860 30 L. J. Bank. 10.

BANK.

Generally speaking. money in the hands of a trustee in bankruptcy is paid into the Bank of England. See *Accounts of Trustee*. p. 3.

The opening of an account at a local bank. i.e. a bank in or in the neighbourhood of the bankruptcy district. may be authorised by the committee of inspection (see *ib.* p. 3. and B. A. 1883 s. 74). As to payments into and out of such a bank. see Rs. 312 340. 341

Bankrupt's own account: Subject to any general rules relating to small bankruptcies under Part VII of the Act of 1883 where the debtor at the date of the receiving order has an account at a bank, such account must not be withdrawn until the expiration of seven days from the day appointed for the first meeting of creditors, unless the Board of Trade. for the safety of the account. or other sufficient cause order the withdrawal of the account (B. A. 1883, s. 74 (5)).

BANKRUPT. (See also Control over Person and Property of Debtor: Discharge of Bankrupt: Disqualifications of Bankrupt.)

- (i) *Meaning of the term.*
- (ii) *Who may be made bankrupt.* p. 41.
 - (a) *Infants.*
 - (b) *Married women.* p. 42.

BANKRUPT (*cont*)

- (c) *Lunatics*, p 43
- (d) *Convicted felons*, p 44
- (e) *Peers and members of the House of Commons*
- (f) *Corporations and registered companies*
- (g) *Foreigners*, p 45
- (iii) *Powers, duties, and liabilities of bankrupt*, p 46

(i) MEANING OF THE TERM "The word bankrupt," wrote William Coke, in his "Bankrupt Laws," 1823, "has been variously derived Coke derived it from *banque* and *route*, which signifies a trace or track, so that, according to him, it means one whose bank is removed, and but a trace or mark left behind. But Mr Justice Blackstone derives it from the word *bancus* or *banque*, which signifies the table or counter of a tradesman, and *ruptus*, broken, denoting thereby one whose shop or place of trade is broken and gone, at the same time he takes notice of Coke's derivation, and further observes that the title of the first English statute concerning this offence (34 and 35 Henry VIII, c 4), "Against such as do make bankrupt, is a literal translation of the French idiom, *qui font banque route*."

Coke also wrote "We have fetched as well the name as the wickedness of the bankrupts from foreign nations. In former times as the name of bankrupt, so was the offence itself, as hath been said, a stranger to an Englishman, who of all nations was freest from bankruptcy. Neither do we find any complaint in parliament, or act of parliament made against any English bankrupt, until the reign of Henry VIII, when the English merchant had rioted in three kinds of costlinesses, viz, costly building, costly diet, and costly apparel, accompanied with a neglect of trade and servants, and thereby consumed his wealth."

While Coke was doubtless right in referring to the Act of Henry VIII as the first "made against a bankrupt," absconding debtors had been dealt with before. The 25 Ed III stat 5, c 23, made members of the Guild of Lombards—which guild consisted of foreign traders resident in England—liable for the contracts of absconding members of the guild, if such contracts were entered into with Englishmen. The Statute 34, Henry VIII, c 4, was

BANKRUPT (*cont.*), (*indiv.*, p. 39)

also designed to meet the case of a person trying to avoid payment of his just debts

The term bankrupt, in its modern acceptation, means one who is insolvent, and whose property has practically been taken from him to be divided amongst his creditors

(ii) WHO MAY BE MADE BANKRUPT —

Preliminary The privileges of the law of bankruptcy were formerly enjoyed only by traders, but the Bankruptcy Act of 1883 practically abolishes that distinction

The following persons, or classes of persons, are subject to special treatment under the law relating to bankruptcy —

(a) Infants As a general rule an infant, i.e., a person under 21 years of age, is not liable to be made bankrupt although he carries on trade, and obtains goods on credit in the course of his business (*Ex p Jones, In re J*, 1881, 18 Ch D 109) The fact that the law excludes an infant from the pains and penalties of bankruptcy should render traders all the more careful in dealing with persons under age, for even if the infant makes a fraudulent representation that he is of full age, it is very doubtful whether a debt incurred by him in consequence of that representation can form the subject of a bankruptcy petition (*ib*) A creditor cannot lie by until his infant debtor is of full age and then set the bankruptcy law in motion in respect of a debt incurred before that time, for it is provided by the Infants' Relief Act, 1874, that contracts entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, are absolutely void Such contracts cannot be sued upon or enforced, even though the infant make a promise to pay after full age, or ratify any promise or contract made during infancy, whether there be any new consideration for it or not An infant's debt which is affected by this Act cannot be made the subject of a bankruptcy petition (*Ex p Kettle*, 1875, L R 10 Ch 373)

Where infant member of a firm, An infant is not liable to bankruptcy proceedings in respect of a debt contracted by a firm in which he is a partner (*Lovell v Beauchamp*, 1894, A C 607), but where an act of bankruptcy is committed by a firm having an infant

BANKRUPT (*cont.*), (*index*, p 39)

partner, while a receiving order cannot be made against the firm simply, it may be made against the firm "other than" the infant partner (*ib*)

When infant can be made a bankrupt If an infant can be made bankrupt at all, it can only be in respect of judgment debt or debts incurred for necessaries. An infant is not liable upon a bill of exchange, although accepted for the price of necessaries (*In re Soltykoff, Ex p Margrett*, 1891, 1 Q B 413)

"Necessaries," *what are* "From the earliest time down to the present the word 'necessaries' is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, degree, and station in life in which he is" (*per Parke, B in Peters v Fleming*, 1840, 6 M and W 42)

(b) Married women —

Generally It may be stated, as a general rule, that a married woman cannot be made a bankrupt, inasmuch as she is incapable of contracting as a *feme sole*. So if husband and wife are carrying on business together in the name of the wife, all contracts being entered into and cheques signed by her, she could not be made bankrupt. But there are certain exceptions to the general rule.

Where woman a sole trader A woman being a sole trader within the City of London (*La Vie v. Phillips*, 1765, 1 W Bl 570) or whose husband is a convict (*Ex p. Franks*, 1831, 7 Bing 762) may be made bankrupt, inasmuch as she is then personally liable for her debts.

Effect of the Married Woman's Property Act, 1882 It is provided by s 1 (5) of this Act, that "every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*," while s 152 of the Bankruptcy Act, 1883, provides that "nothing in this Act shall affect the provisions of the Married Woman's Property Act, 1882." Great importance attaches to the actual words used in the Act just mentioned. Before a married woman can be made bankrupt two conditions must obtain (a) There must be separate property, and (b) She must

BANKRUPT (*cont.*). (*infra*, p. 39)

trade separately from her husband (*In re Helsby*, 1893, 1 Mans 12, for a married woman possessed of a separate estate who carries on no trade cannot be made bankrupt (*In re Gardiner*, *Ex p Coulson*, 1887, 20 Q B D 249)

The test has been said to be—Is she trading independently of her husband, and without being accountable to him for the profits of her business? (*In re Edwards* 1895 43 W R 509) Nevertheless, the mere fact that a married woman carries on business in the house where she lives with her husband, or the fact that he takes part in the management of the business does not make the trade less carried on separately. So where a husband is an undischarged bankrupt, and the business is his wife's business, bought with her money, and the only circumstances opposed to the view that it was hers were that the house in which it was carried on was connected with the house in which the husband lived, and that he took some part in the management the trade was nevertheless held to be carried on by the married woman within the meaning of the Act (*In re Horsley*, (1901) 1 Q B 309, following *In re Dagnall* (1896) 2 Q B 407) Whether the married woman is "carrying on" a trade is a question of fact to be determined in each case (*In re Dagnall*, *supra*) It was held in an Irish case (*In re Long*, 1905, 2 Ir R 343) that a farm is not a "trade" within the meaning of the Act

A married woman who has given up or sold her business is nevertheless liable to bankruptcy proceedings in respect of any debts which may remain unpaid, inasmuch as the trading is not complete until all the obligations under it are discharged (*In re Dagnall*, *ubi supra*)

The extent to which coverture operates to protect a woman from the operation of the bankrupt laws is well illustrated by the case of *In re a Debtor*, 1898, 2 Q B 576. There it was held that a receiving order cannot be made against a married woman, although the debt and act of bankruptcy are admitted, and the petition has come on for hearing and has been adjourned before the marriage. As to a married woman who has been judicially separated, or in whose favour a protection order has been made, she may sue or be sued as a *feme sole*, and may probably be made bankrupt (20 and 21 Vict c 85, ss 21, 25, 26, and see *Williams*, 8th Ed, p 5)

(c) Lunatics. It is strange that there should be any doubt in

BANKRUPT (*cont.*), (*index*, p 39)

the minds of English lawyers as to whether a lunatic may be made bankrupt, but such is the case. That a lunatic can be adjudicated a bankrupt under the direction of his committee acting with the consent of the Court in Lunacy is plain, but whether he can be so adjudicated independently of the Court in Lunacy is doubtful (*In re Farnham (a lunatic)*, 1895, 2 Ch 799). In that case Lindley, L J, said "The question has been an open one since the time of Lord Eldon—suppose we leave it open a little longer" (*ibid* p 805). It was not decided in that case, and has not been decided since.

It has been held, however, that a lunatic cannot commit an act of bankruptcy which involves intent—i.e., the intention to commit such an act—except during a lucid interval (*Crispe v Perrot*, 1744, Willes, 467). For all or any of the purposes of the Bankruptcy Act, 1883, a lunatic may act by his committee or *curator bonis* (B A, 1883, s 148), and in the case of a lunatic debtor "not so found" the court may appoint a person to act for him (B R, 271A).

(d) **Convicted Felons** A convicted felon may be adjudicated a bankrupt upon an act of bankruptcy committed after his conviction. Although s 8 of 33 and 34 Vict, c 23, provides that every convicted felon shall, during the time while he shall be subject to the operation of the Act, be incapable of alienating or charging any property, such a convict can pay a debt which is claimed by a debtor's summons issued and served on him after his conviction, and if he fails to pay the debt within the time limited by the summons, he will commit an act of bankruptcy upon which an adjudication can be made against him (*Ex p Graves*, 1881, 19 Ch D 1).

(e) **Peers and Members of the House of Commons** By s 124 of the Bankruptcy Act, 1883, if a person having privilege of Parliament commits an act of bankruptcy, he may be dealt with under that Act in like manner as if he had not such privilege.

(f) **Corporations and registered companies** By s 123 of the Bankruptcy Act, 1883, a receiving order shall not be made against any corporation, or against any partnership or association, or company registered under the Companies Act, 1862. It may be observed that a partnership consisting of more than seven members, though not registered, may be wound up under the Companies Act 1862 (25 and 26 Vict, c 89), s 199. Such partnerships are

BANKRUPT (*cont*), (*index*, p 39)

not, however, excluded from the operation of s 123 of the B A , 1883 (As to proceedings in partnership name, see *Partners and Joint Debtors*, p 214)

(g) *Foreigners* . One of the most important questions which arise from time to time in the administration of English bankruptcy law is whether and how far foreigners may be made amenable to its jurisdiction . It is material to remember in this connection that the law of bankruptcy is statute law, and that in the nature of things parliament has no power to affect foreigners or aliens by legislation . "The governing principle," said Brett, L J , in *Ex p Blain*, 1879, 12 Ch D at p 528, "is that all legislation is *prima facie* territorial, that is to say, that the legislation of any country binds its own subjects, and the subjects of other countries who for the time being bring themselves within the allegiance of the legislating power" . Consequently, the term "debtor" which is used in the Bankruptcy Act, 1883, must be construed to mean "a debtor properly subject to the laws of England"

Debtor subject to the laws of England : Who, then, is a debtor properly subject to the laws of England ? A case recently decided in the House of Lords affords a favourable illustration . Two American subjects resided and traded at Baltimore, U S , under the name of the Vogeler Company . They carried on a branch business in England through a manager named Geddes, but had no assets there . In December, 1899, the Americans assigned all their property to a trustee in America for the benefit of their creditors . This amounted to an act of bankruptcy according to English law, whereupon one of their creditors in England presented a bankruptcy petition against them . It was held that the Court of Bankruptcy has no jurisdiction to make a receiving order against a foreigner resident abroad, who, without coming into the jurisdiction has in this country had a place of business, contracted debts, and acquired assets, and has executed abroad an assignment of his property for the benefit of his creditors generally . Such a person is not a "debtor" within the meaning of the B A , 1883, s 6 (1) (d), *Cooke v Vogeler & Co* , 1901, A C 102

"The legislature cannot have intended to enact that if a foreigner who is not subject to the laws of England does something in his own country which may be perfectly lawful and innocent by the

BANKRUPT (*cont*), (*index*, p 39)

laws of that country, the effect should be that his property should be vested in a trustee in England for the benefit of his creditors" (*ib*, per Lord Brampton, at p 116) (See also the following cases *Ex p Crispin*, 1873, L R 8 Ch 374, and *In re Pearson*, 1892, 2 Q B 263)

English domicile It is provided by the B A, 1883, s 6 (1) (d), that a creditor shall not be entitled to present a bankruptcy petition against a debtor, unless the debtor is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling-house or place of business in England The meaning of this provision will be discussed when we come to consider the terms of s 6 of the B A, 1883 (See *Domicile*, *Pétition*, p 220.)

(iii) **POWERS, DUTIES, AND LIABILITIES OF BANKRUPT** As the powers, etc, of a bankrupt form the subject of this work, they will be found adequately treated elsewhere The following summary may, however, act as a guide to other headings

(a) **Powers** A bankrupt may apply to the court for an order of discharge (see *Discharge*, p 123) He is entitled to demand payment of any surplus remaining after the payment of his creditors in full, and may be awarded an allowance for assistance rendered in winding up his affairs He may also, by permission of the trustee and the committee of inspection (*q v*), manage his property or carry on his trade (see *Trustee*, p. 332)

The trust property of a bankrupt trustee or executor does not pass to his trustee in bankruptcy (see *Property not Divisible amongst Creditors*, p 247).

As to the effect of a disclaimer of onerous property by the trustee on the property, etc, of a bankrupt, see *Disclaimer*, p 132

As to powers of a bankrupt under a composition or scheme, see *Composition or Scheme of Arrangement*, p 88

As to the right of an undischarged bankrupt to bring actions, see *Property Divisible amongst Creditors*, p 245

(b) **Duties of Bankrupt** A bankrupt must prepare his statement of affairs (*q v*), and must aid in the realisation and distribution of his property He must also file accounts of after-acquired property, and verify the same (See further, *Duty of Debtor*.)

BANKRUPT (*cont*), (*index*, p 39)

(c) *Liabilities* As to the liabilities of a bankrupt, see *Control over Person and Property of Debtor*, *Discharge of Bankrupt*, *Disqualifications of Bankrupt*, *Fraudulent Debtors*

BANKRUPTCY (DISCHARGE AND CLOSURE) ACT, 1887

This Act specifies the procedure which is to be adopted for the discharge of persons made bankrupt under the Bankruptcy Act, 1869, and other repealed Acts It has not been thought necessary to deal with it in this volume

BANKRUPTCY ESTATES ACCOUNT.

This is the account at the Bank of England into which trustees pay moneys received by them Unclaimed sums or dividends are also paid to this account (See generally Rs 341, 345-346A)

BANKRUPTCY NOTICE. (See also Acts of Bankruptcy, p 19)

- (i) *Definition*
- (ii) *By whom issued*
- (iii) *Forms of notice, etc*
- (iv) *Against whom issued*
- (v) *Effect of non-compliance with*
- (vi) *Arrest of debtor*
- (vii) *Rules, etc , as to*

(i) *Definition* . A bankruptcy notice is a demand served by a judgment creditor on a debtor requiring him to pay or secure the debt

(ii) *By whom issued* The notice may be issued by the court at the request of a creditor, i.e., one entitled to enforce a final judgment upon which execution has not been stayed Two judgments cannot be included in one notice It must be served in England within one month from the date of issue, but the court has power to extend the time (R 140)

(iii) *Forms of notice, etc. :* For form of request for bankruptcy notice, see p 22, and form of notice, p. 22

(iv) *Against whom issued* A notice of this kind cannot issue against an infant, nor, generally speaking, against a married woman It may however be issued against a partnership (see *Acts of Bankruptcy* p 22)

BANKRUPTCY NOTICE (cont)

(v) Effect of non-compliance with If the debtor fails to comply with the notice within seven days, he may be made bankrupt unless he satisfies the court that he has a good counter-claim Non-compliance is an act of bankruptcy (see *Acts of Bankruptcy*, p 19) A debtor cannot ask the court to upset the judgment upon which the notice is based (*In re Easton*, 1891, 10 Mor 111), but the court will stay a petition if an appeal is pending from the judgment on which the notice is based (see *Petition*, p. 223)

(vi) Arrest of debtor A debtor against whom a bankruptcy notice has issued may be arrested if he has absconded or there is reason to believe that he is about to abscond (B A , 1883, s 25, (a)).

(vii) Rules, etc , as to A bankruptcy notice must be in the prescribed form, and must state the consequences of non-compliance therewith (B A 1883, s 4 (2)) It may be issued by any court in which a petition may be filed (R 136 (2)) It must be endorsed with the name and place of business of the solicitor who issues it, or with a memorandum that it is issued by the creditor in person (R 138 (1)) It must also be endorsed with an intimation to the debtor that if he has a counter-claim or set-off which he could not have set up in the action in which the judgment was obtained, he must within the time specified file an affidavit with the registrar (R 138 (2)) (See further as to bankruptcy notices (Rs 136-142))

BEDDING (See Apparel, Bedding, etc , p 35)

BENEFICED CLERGYMAN. (See Realisation of Property, p 259)

BILL OF EXCHANGE AND PROMISSORY NOTE

A bankruptcy petition may be founded on a bill not due (see *Petition*, p 220)

As to right of the holder of a bill of exchange to prove in the bankruptcy, see *Debts Provable in Bankruptcy*, p 109

As to whether bills of exchange held by a banker pass to the trustee on his bankruptcy, see *Property not Divisible amongst Creditors*, p 249

A creditor whose debt is on a bill of exchange must be prepared to produce the bill in order to be entitled to vote at the creditors' meeting (see *Meetings of Creditors*, p 197)

BILL OF EXCHANGE AND PROMISSORY NOTE (*cont*)

As to entry of bills of exchange in the statement of affairs, see *Statement of Affairs*, p 304

BILLS OF SALE

I GENERALLY

II OBJECT AND EFFECT OF THE BILLS OF SALE ACT, 1878

III OBJECT AND EFFECT OF THE ACT OF 1882

IV PROVISIONS APPLICABLE TO BILLS OF SALE UNDER ACTS OF 1878 AND 1882, p 51 *et seq* —(a) *Who may grant a bill*(i) *Bill by two persons*(ii) *Partners and trustees*(iii) *Infant*, p 52(iv) *Married woman, lunatic, etc*(v) *Executors, etc*(vi) *Undischarged bankrupt*(b) *Definition of bill of sale*(i) *Generally*(ii) *Text of s 4 of Act of 1878*, p 53(iii) *What are personal chattels*(iv) *Trade machinery*, p 54(v) *Assignments, transfers, etc*(vi) *Powers of attorney, authorities, or licences*(vii) *Documents conferring equitable interest*, p 55(viii) *Exceptions* (1) *Assignments for the benefit of creditors*,
(2) *Marriage settlements*, (3) *Debentures and securities on imported goods*(ix) *Documents deemed to be bills of sale*, p 57(c) *Consideration*(d) *Avoidance of duplicate bills*

V LAW AS TO ABSOLUTE BILLS OF SALE, p 58.

(i) *Generally*(ii) *Apparent possession*(iii) *Attestation and registration*, p 59(iv) *Avoidance of absolute bill*(v) *Order and disposition*(vi) *Form of absolute bill of sale*

BILLS OF SALE (*cont*), (*index*, p 49)

VI LAW AS TO BILL OF SALE GIVEN IN SECURITY FOR MONEY p 60

Generally

- (i) *Statutory form*, p 61
- (ii) *Importance of the form*, p 62
- (iii) *Departure from the form*, p 62
- (iv) *Description of the grantee*
- (v) *Consideration*
- (vi) *Description of property*, p 63
- (vii) *Grantor to be true owner*
- (viii) *Principal and interest*, p 64
- (ix) *Covenants generally*
- (x) *Covenant for payment*
- (xi) *Provisoes for seizure*, p 65, *et seq* (1) *Default in payment, etc*, (2) *Grantor becoming bankrupt*; (3) *Grantor suffering removal of goods*, (4) *Failure by grantor to produce receipts for rent, etc*, (5) *Levy of execution*
- (xii) *Rights of grantor*, p 67
- (xiii) *Rights of grantor's creditors*

VII EXECUTION AND ATTESTATION

VIII THE SCHEDULE

IX REGISTRATION OF BILLS OF SALE, p 68

X BILLS OF SALE AND THE LAW OF BANKRUPTCY, p 69

XI BILL OF SALE MAY BE FRAUDULENT PREFERENCE, p 71

XII AVOIDANCE OF BILL OF SALE AT COMMON LAW, p 71

1 **GENERALLY** The law relating to bills of sale places important restrictions upon mortgages of chattels. At common law, where chattels are mortgaged the property in them passes at once to the mortgagee, but it is usual to insert a provision under which the mortgagor is allowed to retain possession. If he does not pay the debt at the proper time, the mortgagee retains the right to possession, subject to the right of the mortgagor to redeem so long as the goods remain in his possession (*Johnson v Diprose*, 1893, 1 Q B 512). These common law principles are very materially modified by the Bills of Sale Acts.

BILLS OF SALE (*cont.*), (*index*, p 49)

A transaction which is void under the Bills of Sale Acts cannot be a protected transaction within s 49 of the B A, 1883 (see *Protected Transactions*, p 253)

II OBJECT AND EFFECT OF THE BILLS OF SALE ACT, 1878 This Act applies to all bills of sale (as defined below) which confer on the grantee a power to take possession of mortgaged chattels. One object of the Act is to provide for the proper execution and registration of bills of sale, so as to protect the creditors of a person who might otherwise make a secret mortgage of his goods. A creditor can always examine the register to see if his debtor has executed a bill of sale. If not registered, or if it does not otherwise comply with the Act, the bill is void in respect of the personal chattels comprised therein.

III OBJECT AND EFFECT OF THE ACT OF 1882 This Act applies to bills of sale (as defined below) given "by way of security for the payment of money." Such a bill of sale must also be registered and must comply with the statutory form, the object being to protect debtors from being lured into signing complicated documents which they do not understand. The question whether the bill is given by way of security is one of fact, and the court will enquire into all the circumstances of the case (*Beckett v Tower Assets Company*, 1891, 1 Q B 638).

IV PROVISIONS APPLICABLE TO BILLS OF SALE UNDER ACTS OF 1878 AND 1882 —

(a) Who may grant a bill Any person, with capacity to contract, may become the grantor of chattels personal, but he cannot transfer a right which he himself does not possess, although, if he has a qualified interest in goods, he can charge them to the extent of that interest (*Cook on Mortgages*, 5th Ed, p 647).

(i) *Bill by two persons* A bill of sale cannot be given by two persons in respect of goods, some of which are owned by one and some by the other grantor (*Saunders v White*, 1902, 1 K B, 472), but if they were joint-owners they could be joint-grantors.

(ii) *Partners and trustees* It is open to question whether a bill can be given by partners (*ib.*) and, although it has not been definitely decided, Bowen, L J, has expressed the view that a trustee may give a bill of sale (*Melville v Stringer*, 1884, 13 Q B D, 392).

BILLS OF SALE (*cont*), (*index*, p 49)

(iii) *Infant* A bill of sale given by an infant may be held not binding on him. Thus a deed executed by an infant to secure advances made to him for expenditure for necessaries, whereby he granted and assigned his reversionary interest in certain chattels to the plaintiff, subject to the usual proviso for redemption on payment of principal money and interest, was held voidable by him when he came of full age (*Martin v Gale*, 1877, 46 L J Ch, 84)

(iv) *Married woman, lunatic, etc* A married woman may, by virtue of the Married Woman's Property Act, 1882, dispose of her separate property as if she were a single woman, so that she is competent to give a bill of sale. Where a lunatic, or a man who is drunk at the time, gives a bill of sale, it is voidable at his option, unless the contracting party did not believe, and had no reasonable cause for believing, that he was insane or drunk.

(v) *Executors, etc* An executor, or administrator, may also, in certain cases, give a valid bill of sale over the property of his testator.

(vi) *Undischarged bankrupt* The question whether an undischarged bankrupt is capable of giving a bill of sale requires some careful consideration. As property acquired by an undischarged bankrupt vests in his trustee (by virtue of the Bankruptcy Act, 1883, s 44 (1)), it is conceived that an undischarged bankrupt may not give a bill. Nevertheless, all transactions (except those which relate to real estate) entered into by a bankrupt in respect of property acquired after the bankruptcy, and before the trustee intervenes to claim, if with a person who proves that he dealt with the bankrupt in good faith and for value, whether with or without the knowledge of the bankruptcy, are valid against the trustee (*Cohen v Mitchell*, 1890, 25 Q B D, 262). So, too, an undischarged bankrupt, to whom furniture has been given by a resolution of creditors, can assign it by a bill of sale (*Brown v Hickinbotham*, 1881, 50 L J, Q B, 426).

A bill of sale may be executed under a power of attorney, and the grantee of the bill is not necessarily excluded from being appointed as the attorney (*Furnival v Hudson*, 1893, 1 Ch, 335).

(b) *Definition of a bill of sale*: (i) *Generally* The term bill of sale

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originally meant an instrument whereby the property in personal chattels was transferred under a contract of sale. It has however, been gradually applied to mortgages as well as sales, and it has also come to include the implication that actual possession of the chattels was not given to the purchaser or mortgagee, although it often recites and was accompanied by a symbolical delivery of possession. It may now be said that the Bills of Sales Acts do not apply to "any case where the object and effect of the transaction are immediately to transfer the possession of the goods in question from the grantor to the grantee" (See *per* Cave, J, in *Ex p Close, In re Hall*, 1884, 14 Q B D 386). The Bills of Sale Acts strike at documents. The present meaning of a bill of sale within the Acts of 1878 and 1882 is to be found in the Act of 1878.

(ii) *Text of s 4 of the Act of 1878*. Sect 4 of this Act provides that "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon shall be conferred, but shall not include the following documents—that is to say, assignments for the benefit of the creditors, of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising, or purporting to authorise, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented."

(iii) *What are personal "chattels"*. By the Bill of Sale Act, 1878, sect 4, "personal chattels" include goods, furniture, and articles capable of complete transfer by delivery, and fixtures and growing

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crops when separately assigned or charged, but they *do not include* (1) Chattel interest in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned with freehold or leasehold interest, (2) Shares, (3) Choses in action, (4) Stock or farm produce which ought not to be removed. As to growing crops, these may become chattels as soon as they are severed from the land (*Ex p Nat Merc Bank*, 29 W R, 227)

(iv) *Trade machinery* Certain trade machinery is also deemed to be included in the term "personal chattels" for the purposes of the Acts (see s 5 of the Act of 1878, as to trade machinery, see the following cases *In re Yates*, 38 Ch D 112, *In re Brooke*, *Brooke v Brooke*, 1894, 2 Ch 600, and *Small v National Provincial Bank*, 1894, 1 Ch 686)

(v) *Assignments, transfers, etc* We have seen that the phrase includes "Bills of sale, assignments, transfers, declarations of trust without transfers, inventories of goods with receipts thereto attached, or receipts for the purchase money of goods, and other assurances of personal chattels"

The word "assurance" qualifies all the preceding words, and to be an assurance the document must be one "on which the title of the transferee of the goods depends, either as the actual transfer of the property, or an agreement to transfer, or as a muniment or document of title taken at the times as a record of the transaction" (*Marsden v Meadows*, 1881, 7 Q B D 80). But if the transaction is complete without reference to the document, the document is not then a bill of sale. So if a sale of goods, or a charge upon goods is effected by parol, and can be proved by parol evidence, a document which merely records the transaction is not a bill of sale. The test is, "is it necessary to put the document in evidence to prove the transaction and support the title claimed" (*Haydon v Brown*, 1888, 59 L T, 810). See *London and Yorkshire Bank v White*, 1894, 11 T L R, 570. Again, where goods are pledged with a pawnbroker, who gives a pawn ticket to the pledger, the ticket is not a bill of sale, as the transaction is complete without it (see *per Cave, J*, in *Ex p Close*, *In re Hall*, 1884, 14 Q B D 386).

(vi) "*Powers of attorney, authorities, or licences, etc*" The expressions, "*Powers of attorney, authorities, or licences to take*

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possession of personal chattels as security for any debt” are only applicable to documents which are consistent with the possession of the goods remaining in the grantor (*Ex p Hubbard In re Hardwick*, 1886 17 Q B D 690) They do not include the case of an ordinary lease where the landlord has a power to distrain for rent Where, however, a landlord has power to distrain upon property of his tenant in a house other than that which is included in the lease, the document is a bill of sale (see *In re Roundwood Colliery Co.*, 1897 1 Ch 373) The words above set out do not include a proviso in a building lease to the effect that the landowner may re-enter upon the builder’s default and providing that on such re-entry all building materials on the land shall be forfeited to and become the property of the landowner “as and for liquidated damages,” for the reason that in such a case, possession is not taken as “security for any debt” (*Ex p Newitt, In re Garrud*, 1881 16 Ch D 522) nor do they include a *bonâ fide* hiring agreement, whereby the owner reserves power to resume possession upon the hirer’s default, the hirer not being the owner of the chattels (*M’Entire v Crossley* 1895 A C. 457)

(vii) *Documents conferring equitable interest* An agreement conferring a right in equity to chattels is a document which creates a right in equity as distinct from a right at law. The provision does not apply to documents by which a right in law is given (*Reeves v Barlow* 1883, 12 Q. B. D. 436) Suppose B. sells his business to A with a clause providing that B may have a lien on stock-in-trade for unpaid purchase money this is a bill of sale (*Coburn v. Collins* 1887 35 Ch D 373)

But if a bill is a security for money, it must be in a statutory form. Therefore, none of the documents which may be bills within (a) and (b) *supra* are valid as security for monetary advances.

(viii) *Exceptions* : It is as important to consider what documents are *not* as to consider what documents *are*, bills of sale

(1) *Assignments for the benefit of creditors* . These are assignments for the benefit of creditors generally. Such assignments must be registered under the Deeds of Arrangement Act, 1887 (see *Deeds of Arrangement*). If not so registered they may be declared void In order to escape being a bill of sale, the assignment must be

BILLS OF SALE (*cont*), (*index*, p 49)

for the benefit of creditors generally An instrument authorising a creditor to take possession of a debtor's goods and sell them, paying out of the proceeds the debts due to himself and other creditors, was decided to be a bill of sale requiring registration (*Ex p Parsons, In re Townsend*, 34 W R 329, see also *Hadley v Beedom*, 1895, 1 Q B 646)

(2) *Marriage settlements* Were they not specially exempted from the Bills of Sale Act, it is obvious that ante-nuptial settlements might well come within the definition of a bill of sale Having in view the objects which these Acts are intended to serve, it is clear that marriage settlements were very justly excepted The object of the section is to exclude from the operation of the Acts instruments, the intention and effect of which is, not merely to assign goods from one person to another, but to create a trust for the purpose of carrying out a provision for a marriage But post-nuptial settlements are not within this exception (*Ex p Stray*, 1867, L R 2 Ch 374) So, if a man settle furniture, etc., on his wife, the settlement must be registered as a bill of sale The object of this rule is to prevent, as far as possible, a trader unjustly, and in fraud of his creditors and other persons with whom he is dealing, turning over his property to his wife in order that, when execution is sought to be put upon his goods, he may, figuratively speaking, show a pair of empty pockets Creditors, however, are always liable to be deprived of their security when husband and wife are living together, for in those circumstances the law attributes possession to the person who has the legal title, and it would appear that a post-nuptial settlement, whereby chattels are assigned by a husband for his wife's separate use, is not necessarily affected by the Acts, even though the chattels are in the joint domicile at the time of execution or bankruptcy So a duly registered bill of sale, given for valuable consideration, by which a husband assigned to his wife for her separate use, furniture which remained in the joint possession of the husband and wife at the time of the former's liquidation, was upheld against his creditors (*Ex p Cox, In re Reed*, 1875, 1 Ch D 302)

(3) *Debentures and securities on imported goods* Nothing in the Act of 1882 applies to any debentures issued by any mortgage loan or other incorporated company and secured upon the capital stock

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on goods chattels, and effects of such company (s 17) See also the Bills of Sale Acts, 1890 and 1891, which except from the operation of the Acts of 1878 and 1882 certain securities on imported goods

(1\) *Documents deemed to be bills of sale* It is also provided by sect 6 of the Act of 1878 that —

“Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given, or agreed to be given, by any person to any other person by way of security for any present, future, or contingent debt or advance, and thereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress

“Provided, that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor, as his tenant, at a fair and reasonable rent ”

An attornment clause in a mortgage of land giving a power of distress to the mortgagee as security for payment of interest in arrears (*Ex p Kennedy, In re Willis*, 1888, 21 Q B D 384), and a stipulation in a tenancy agreement giving the landlord power to distrain for the price of goods supplied (*Pulbrook v Ashby & Co*, 1887, 56 L J , Q B 376) have been held to be bills of sale within this section

(c) *Consideration* . The consideration for which a bill of sale is given must be truly stated (as to absolute bills, Act of 1878, s 8, as to bills by way of security, Act of 1882, s 8) Where it was described as the sum of £90 “now due and owing,” £50 being advanced at the time, this was held not to be a true statement (*Davies v Jenkins* 1900, 1 Q B 138) See also as to consideration *Usher & Co v Martin*, 1890, 61 L T 778, *Ex p Hunt*, 1883, 13 Q B. D 36 *In re Wiltshire*, 1900, 1 Q B 96, *Reed v Franks*, 1900, 16 T L R 347)

(d) *Avoidance of duplicate bills* . Where a subsequent bill of sale is executed within or on the expiration of seven days after the

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execution of a prior unregistered bill, and comprises all or any part of the personal chattels comprised in such prior bill, then, if the subsequent bill is given as security for the same debt or any part of that debt, it shall to that extent, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved that the subsequent bill was *bonâ fide* given for the purpose of correcting some material error in the prior bill, and not for the purpose of evading the Act (Act of 1878, s 9) This section is intended to prevent the issue of successive unregistered bills of sale at such times as to avoid registration (see *Registration, infra*) It does not apply to a subsequent bill of sale executed *more than* seven days after an unregistered bill (*Carrard v Meek*, 1881, 50 L J, Q B 187)

V LAW AS TO ABSOLUTE BILLS OF SALE —

(1) **Generally** Absolute bills of sale are still governed by the Bills of Sale Act, 1878 Bills given as security for money prior to Nov 1, 1882, are classed with absolute bills, subject to the provisions of s 13 of the Act of 1882 The Act of 1878 does not prescribe a form, and it is obvious that it could not do so, in view of the fact that instruments of extraordinary variety may be absolute bills of sale

(ii) **Apparent possession** The articles referred to in an absolute bill of sale shall be deemed to be in the "apparent possession" of the person making or giving the bill of sale, so long as they remain, or are in, or upon, any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by, or given to any other person (Act of 1878, s 4) Two classes of apparent possession are mentioned (1) Where the chattels subject to the bill of sale are upon premises occupied by the grantor, and (2) Where they are used and enjoyed by him in any place whatsoever When the grantor of an unregistered bill was tenant of rooms, where the goods comprised in it were placed, but resided elsewhere, and, having made default in payment, gave up the keys of the rooms to the grantee, who opened the rooms and put his name on some of the goods which, however, remained on the

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premises, it was held that the grantor did not occupy the rooms, and that the goods were not to be deemed in his apparent possession

• (*Robinson v Briggs*, 1870, L R , 6 Ex , 1)

(iii) Attestation and registration It is to be observed that, in the case of an absolute bill, attestation is by a solicitor (s 10 (1)) This is to ensure that the object of the document which he is signing shall have been made quite plain to the grantor An absolute bill of sale must be registered (see *Registration, infra*) and attested, and must set forth the consideration, otherwise it may be void against certain persons

(iv) Avoidance of an absolute bill The persons against whom s 8 of the Act of 1878 avoids a bill are (a) Trustees or assignees of the grantor in bankruptcy, (b) Trustees under any assignment for the benefit of creditors, (c) Sheriffs' officers or other persons seizing the chattels in the execution of process of court, and (d) Every person on whose behalf such process has been issued An unregistered bill is good as between grantor and grantee (*Davis v Goodman*, 1880, 5 C P D 128) Thus the grantee of an unregistered bill of sale, or of one whereof the registration has not been renewed in accordance with the Act of 1878, can give a good title to the chattels comprised in the bill by executing a subsequent bill which complies with the Acts (*Antomadi v Smith*, 1901, 2 K B 589, but see *Hopkins v Gudgeon*, 1906, 1 K B 690) In the case of an execution creditor, the bill is only avoided to the extent which may be necessary to give effect to the execution (*Ex p Blasberg, In re Toomer*, 1883, 23 Ch D 254)

(v) Order and disposition Chattels comprised in an absolute bill duly registered are not in the order and disposition of the grantor within the meaning of the Bankruptcy Act (Act of 1878, s 20)

(vi) Form of an absolute bill of sale " This Indenture, made the 1st day of December, 1905, between James Thompson (hereinafter called the grantor) of the one part, and Andrew Macdonald (hereinafter called the grantee) of the other part Whereas the grantor has agreed with the grantee for the absolute sale to the grantee of the machinery and plant specified in the schedule hereunder written for the sum of £100 Now this Indenture witnesseth

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that, in pursuance of the said agreement, and in consideration of the sum of £100 to the grantor, paid by the grantee (the receipt whereof the grantor hereby acknowledges), he, the grantor, as beneficial owner, doth hereby convey and assign unto the grantee all and singular, the said machinery and plant, to hold the same unto the grantee, his executors, administrators, and assigns absolutely In witness whereof the said parties to these presents have hereunto set their hand and seals the day and year first above written

"Signed, sealed and delivered by the
said James Thompson, in my
presence, the effect of the above-
written bill of sale having been
explained to the said James
Thompson before his execution
thereof by me, the attesting
solicitor,

" *James Thompson*

" *Robert Knowles,*

" 103, Bedford Row, W C "

[SCHEDULE]

VI LAW AS TO BILL OF SALE GIVEN IN SECURITY FOR MONEY —

Generally These bills, if given after Nov 1, 1882, are governed by the Act of 1882 The question whether a particular bill is given as security is one of fact to be decided in each case So an absolute bill of sale may, in reality, be given by way of security if accompanied by a hiring agreement (*Ex p Odell, In re Walden*, 1878, 10 Ch D 78, see also *Ex p O R, In re Watson*, 1890, 25 Q B D 27, *Madell v Thomas*, 1891, 1 Q B 230, *Beckett v Tower Assets Co*, 1891, 1 Q B 638, *Maas v Pepper*, 1905, A C 102) A contemporaneous agreement to pay interest on the debt will avoid the registration (*Edwards v Marcus*, 1894, 1 Q B 587, and see *Ellis v Wright*, 1897, 76 L T 522), (as to consequence of non-registration, see *Registration, infra*)

(1) **Statutory form of bill given as security for money** The following is a simple form of a conditional bill of sale which complies with the requirements of the Act of 1882 —

" This Indenture, made the 1st day of January, 1906, between

BILLS OF SALE (*cont*) (*under*, p. 49)

John Brown. pharmaceutical chemist. of the one part and Tom Smith. jeweller. carrying on business at 1004. Oxford Street of the other part. Witnesseth. that in consideration of the sum of £50 now paid to John Brown by Tom Smith the receipt of which the said John Brown hereby acknowledges he. the said John Brown. doth hereby assign unto Tom Smith his executors administrators and assigns all and singular. the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £50 and interest thereon at the rate of 5 per cent. per annum. And the said John Brown doth further agree and declare that he will duly pay to the said Tom Smith the principal sum aforesaid together with the interest then due. by equal half-yearly payments of £25 on the 1st day of July. 1908. and the 1st day of January. 1909. And the said John Brown doth also agree with the said Tom Smith that he will at all times during the continuance of this security insure and keep the said chattels and things insured against loss and damage by fire in the sum of £50 at the least. And will pay rent to become due. and payable by him in respect of the premises on which the said chattels and things or any of them now are. Provided. always. that the chattels hereby assigned shall not be liable to seizure. or to be taken possession of by the said Tom Smith. for any cause other than those specified in sect. 7 of the Bills of Sale Act (1878) Amendment Act. 1882

In witness whereof. the parties to these presents have hereunto set their hands and seals the day and year first above written.

Signed and sealed by the said John

Brown. in the presence of me.

Silas Upkeep. of 2 Newbolt Lane

in the City of London. Tailor's

Foreman.

"John Brown.

"Silas Upkeep.

(ii) Importance of the form : With reference to this form. it is provided by the Act of 1882 sect. 9. that a bill of sale made. or given. by way of security for the payment of money. by the grantor thereof. shall be void unless made in accordance with the form in the schedule to the Act. Unless the form is complied with the bill is void absolutely—against the grantor and his creditors. It

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follows, therefore, that inventories of goods, with receipts attached, receipts, powers of attorney, licences to seize goods, and agreements conferring a right of equity to personal chattels, cannot now be bills of sale to secure money, as they cannot be in the form. But certain documents referred to in sect 6 of the Act of 1878—e.g., an agreement giving a power of distress, whereby any rent is made payable as a mode of providing for the payment of interest on a debt or advance—need not be in the form here given. Mr Reed says, in his work on “Bills of Sale,” at p 175 “The object of the section and the form is twofold (1) To secure that the borrower shall understand the nature of the security, (2) That a creditor, on merely searching the register, shall be able to understand the borrower’s position without legal assistance.” The exact words of the form need not be complied with, but nothing substantial may be subtracted from it, and nothing actually inconsistent may be added (*Davis v Burton*, 1883, 11 Q B D 537)

A grantor cannot convey, or assign, “as beneficial owner,” the introduction of those words being an attempt to incorporate the covenants in sect 7 of the Conveyancing Act, 1881, including the covenant for quiet enjoyment (*Ex p Stanford, In re Barber*, 1886, 17 Q B D, 259)

(iii) Departure from the form. A bill is void “when it departs from the statutory form in anything which is characteristic of that form” (*Thomas v Kelly*, 1888, 13 A C 506). Where, however, an instrument comprises a mortgage of real property as well as chattels, it may be valid as to the real property though void as to the chattels (*Ex p Mason, In re Isaacson*, 1895, 1 Q B 333)

(iv) Description of the grantee. Some description of the grantee must be given, it would not be sufficient to describe him as “Tom Smith” (*Altree v Altree*, 1898, 2 Q B 267). (As to the effect of misnomer of the grantor, see *Lee v Turner*, 1888, 20 Q B D 773, *Stokes v Spencer*, 1900, 2 K B 483)

(v) Consideration. By the Act of 1882, sect 12, every bill, made or given in consideration of any sum under £30, is void. It is not necessary that the consideration money shall pass at the date of the bill, the sum in security for which the bill is given may be a pre-existing debt. The amount must be a sum certain

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(vi) Description of property . The words "*All and singular the several chattels described in the schedule*," are of considerable importance . Every conditional bill of sale must have annexed thereto, or written thereon, a schedule containing an inventory of the personal chattels comprised therein , and such bill of sale (subject to a reservation presently referred to) has effect only in respect of the personal chattels specifically described in the schedule , and shall be void (except as against the grantor) in respect of any personal chattels not so specifically described (Act of 1882, sect 4) Suppose, for instance, the schedule was in the following form " The Brinsmead piano, the green sofa, and all the other furniture in the parlour, at No 203, Gower Street " The " other furniture " in the drawing-room would not be protected by the bill of sale if seized by a creditor . The piano and sofa would be protected from seizure if the grantee claimed that they had been assigned to him . As between grantor and grantee, however, the schedule would be valid to give the grantee a charge over all the furniture in the drawing-room (see *Davidson v Carlton Bank*, 1893, 1 Q B 82 , *Davies v Jenkins*, 1900, 1 Q B 133) The goods specified in the schedule must be capable of present assignment . It would not be valid to affect furniture "which may, hereafter," be on the grantor's premises . Only personal chattels can be inserted in the schedule . Words may be added to include chattels to be substituted, either under a covenant for substitution, or within the protection of s 6 (2) (*Seed v Bradley*, 1894, 1 Q B 319 , *Coates v Moore*, 1903, 2 K B 140) Goodwill, tenant-right, and other matters could not be inserted . The exceptions to the rule as to specific statement in the schedule are to be found in s 6 of the Act of 1882, and extends to (a) growing crops, (b) fixtures and trade machinery which are brought on to the grantor's premises to replace fixtures or machinery which may be removed .

(vii) Grantor to be true owner . One other important section of the Act of 1882 must be noted here . It is provided by s 5 that, "Save as hereinafter mentioned (i.e., in s 6, *ubi supra*), a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner at the time of the execution of the bill of sale " Suppose that the furniture over

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which John Brown gave the bill of sale really belonged to Miss Brown at the date of the bill, the bill would be void against (for example) creditors. The effect of the section may be said to be to seriously affect the validity of a bill which covers a floating stock-in-trade. The word "owner" is used in its natural sense. A bill of sale given in 1888, to secure money lent in good faith to the grantor, was held void under the section, the grantor having in 1885 parted with the property by unregistered deed of gift, of which the bill of sale holder had no notice (*Tuck v Southern Deposit Bank*, 1889, 42 C D 471, see also *Saunders v White*, 1902, 1 K B 472).

(viii) **Principal and interest** : The condition must state a definite principal sum, and must also comprehend interest, though the interest may be such as is agreed on, calculated at a rate per month, or otherwise, and may be payable by instalments, which need not be equal, but must be rateable, otherwise there will be a variance from the form. Interest may be declared payable by the month or year. Thus a clause to the effect that the grantor agrees to pay "1s per £ per month," a form and rate of payment sometimes adopted by money-lenders, would be valid (*Lumley v Simmons*, 1887, 34 Ch D 698, see also *Moumand v Le Clane*, 1903, 2 K B 216). Calculation of interest in a lump sum, to become payable on failure to pay any instalment, was held not to be in accordance with the form (*Ex p Abiams, In re Johnstone*, 1884, 50 L T 184).

(ix) **Covenants generally**. Certain covenants have been inserted in the model form of bill of sale, but the statutory form which is to be found in the Schedule to the Act does not specify any particular covenants which may be inserted. It may be stated generally, however, that covenants for the maintenance of the security are legitimate. A covenant in a bill given in respect of household goods, whereby the grantor undertakes to replace any articles worn out by others of equal value, does not invalidate the bill, inasmuch as it is a covenant for the maintenance of the security (*Coates v Moore*, 1903, 2 K B 140).

(x) **Covenant for payment**. A covenant for payment must name a stipulated time or times for payment, but a covenant to pay "on or before" a certain date, with a provision for defeasance of the

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security at the grantor's option at an earlier date, accords with the form (*De Braam v. Ford* 1900, 1 Ch. 142).

- (xi) *Provisoes for seizure: Generally* • The ordinary form of proviso for seizure has the effect of incorporating in the bill of sale the provisions of s. 7 of the Act of 1882 s.s. (1) of which provides that personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee except for certain specified causes (see 1-5 *infra*) The grantor may, within five days from the seizure for any of these causes, apply to the court, and the court, if satisfied that by payment of money or otherwise, the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just.

If the grantor becomes bankrupt after seizure, the trustee in bankruptcy can only redeem by paying the whole amount owing on the security (*Ex p. Woolfe, In re Wood* 1894, 1 Q. B. 605)

For the purpose of carrying out the objects of this sub-section, it is further provided by s. 13 that personal chattels seized under a bill of sale must remain on the premises where they were so seized or so taken possession of and must not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of. These five days of grace will give a grantor an opportunity of carrying out the condition in respect of which the seizure may have been effected. It is now proposed to consider the various provisions for seizure

(1) *Default in payment etc.* : " If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security.' It is to be observed that it is not necessary for the grantee of the bill to make any demand for payment on or shortly before the days which are mentioned in the bill. If a bill of sale holder chooses to enlarge the time for payment, a default under the terms of the deed will not according to the case of *Albert v. Grosvenor Investment Company* (1867, L. R., 3 Q. B. 129) warrant a seizure.

(2) *Grantor becoming bankrupt* • " If the grantor shall become

BILLS OF SALE (*cont*), (*index*, p 49)

a bankrupt, or suffer the said goods to be distrained for rent, rates or taxes" (s 7 (2)) While a grantee may obtain all the advantages of a secured creditor in the bankruptcy of the grantor, the occurrence of bankruptcy may have a very prejudicial effect on the grantee's security This is for the reason that chattels comprised in a bill of sale, given after the commencement of the Act of 1882, by way of security for the payment of money, are in certain cases subject to the reputed ownership clause of the Bankruptcy Act

(3) *Grantor suffering removal of goods* "If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises" (s 7 (3)) As the value of a bill of sale rests in the fact that it provides a security for an advance, any attempt to tamper with or remove the security enables the grantee to protect himself by instant seizure Mere removal will not be sufficient, it must be shown to be with intent to deprive the mortgagee of his remedy (*Parry v Duncan*, 1881, 7 Bing 243) Where, however, the effect of the removal would be to deprive the mortgagee of his security, and leave him to merely enforce his remedy by action, it seems that the removal may be within the sub-section (*Opperman v Smith*, 1824, 4 D and Ry 33)

(4) *Failure by grantor to produce receipts for rent, etc* "If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rents, rates, and taxes" (s 7 (4)) This clause is important, when it is remembered that during the five days when the goods must remain on the grantor's premises, the landlord and the tax collector may come in and distrain As to what is a reasonable excuse for not producing the receipt, the fact that a grantor did not produce a receipt for rent which had only become due a few days, and of which the landlord had not yet required payment, was held to be a reasonable excuse (*Ex p Cotton*, 1883, 11 Q B D, 301)

(5) *Levy of execution* "If execution shall have been levied against the goods of the grantor under any judgment at law" (s 7 (5)) Levy need not extend to the goods mentioned in the bill of sale Thus a man might give a bill of sale over the furniture in his drawing-room, while the person levying execution might seize the furniture in the dining-room Such a seizure would be a

BILLS OF SALE (*cont*), (*index*, p 49)

levy within the meaning of the section The term "judgment" may include every order of the court or a judge, in any cause or matter which may be enforced in the same manner as a judgment to the same effect

(xii) Rights of grantor : The right of the grantor to retain possession is defined by s 7 (*sub tit Seizure, supra*) If he were interfered with by the grantee, he could maintain trespass (*Johnson v Diprose*, 1893, 1 Q B 512), but he cannot sell the chattels comprised in the bill (*Edwards v Marston*, 1891, 1 Q B 225) His right to redeem is now extended by the Moneylenders Act, 1900 s 1

(xiii) Rights of grantor's creditors A grantor's creditor may seek to upset a bill of sale by pointing out a flaw in the registration The bill affords no protection against distress under a warrant for the recovery of taxes or poor or other parochial rates (Act of 1882, s 14), although it does protect the chattels from liability to execution under a judgment for rates (*Wimbledon L Bd v Underwood*, 1892, 1 Q B 836) With regard, however, to reputed ownership, this is unaffected by s 7 of the Act of 1882, it being in all cases a question of fact (*In re Ginger, Ex p London and Universal Bank*, 1897, 2 Q B 461)

VII EXECUTION AND ATTESTATION The execution must be attested by one or more credible witness or witnesses not being a party or parties thereto (Act of 1882, s 10), and the witness's name, address, and description must be given A deed was held void where the witness merely signed his name, without adding address or description, although the affidavit filed on registration correctly described both (*Parsons v Brand*, 1890, 25 Q B D. 110) Omission of the witness's occupation might also be fatal If witness has no occupation, this fact should be mentioned (*Sims v. Trollope*, 1897, 1 Q B, 24) The technicality with which the statutory form of a bill of sale is attended is well illustrated by these elaborate rules, which relate to persons who are merely witnesses to the document

VIII THE SCHEDULE The bill itself contains no list of the things intended to be assigned These must be placed in a schedule, which is essential to the validity of the bill (*Griffin v Union Deposit Bank*, 1887, 3 T L R 608), (see further, *Description of Property, supra*), p 63

BILLS OF SALE (*cont*), (*index*, p 49)

IX REGISTRATION OF BILLS OF SALE Generally Every absolute bill must be attested and registered in accordance with the Act of 1878, s 8, within seven days of execution, otherwise it is deemed fraudulent and void as regards the property and right to the possession of any chattels comprised therein, which were in the possession, or apparent possession, of the grantor The bill must be attested by a solicitor of the Supreme Court, and the attestation clause must state that the effect of the bill has been duly explained by the solicitor to the grantor (Act of 1878, s 10 (1))

A bill of sale given by way of security must be registered within seven clear days after the execution thereof, and must set forth the consideration, otherwise it shall be void absolutely as respects the goods mentioned therein (Act of 1882, s 8) Thus the grantee has no title to the chattels mentioned in an unregistered bill even if he has taken possession (*Ex p Parsons, In re Townsend*, 1886, 16 Q B D 532)

Provision is made for the local registration of bills by s 11 of this Act, and by s 16 the register is declared open to public inspection

Every bill of sale, together with every schedule annexed thereto, must be registered, and a copy filed, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving it, and of every attesting witness (Act of 1878, s 10 (2)) This affidavit is a highly technical document, and must be drawn with the greatest care If a bill is made or given, subject to any defeasance, or condition or declaration of trust, not contained in the body thereto, such defeasance, condition, or declaration, shall be deemed part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under the Act therewith and as part thereof, otherwise the registration shall be void (*ib* s 10 (3)) (See on this section, *Ford v Kettle*, 1873, 9 Q B D 139, *Yates v Ashcroft*, 1882, 47 L T 337, *Stokes v Spencer*, 1900, 2 Q B 483) Suppose, for instance, by a collateral agreement, a bill, which was absolute in form, was to be treated as conditional upon repayment of the sum mentioned in the bill by a certain day,

BILLS OF SALE (*cont*), (*index*, p 49)

creditor In order, however, that the execution of a bill of sale, of substantially all the grantor's property as security for a pre-existing debt and future advances, may not be an act of bankruptcy, it is necessary that there should be an agreement to make further advances, and it is not sufficient that further advances should have been in the contemplation of the parties, the deed being stamped so as to cover them, and they having been actually made after the execution of the deed (*Ex p Dann, In re Parker*, 1881, 17 Ch D 26) The test in every case appears to be, not whether the further advance was large or small, but was the fresh advance made with the intention of enabling the borrower, if a trader, to carry on business, and has the lender reasonable grounds for believing that the advance would enable the borrower to do so? If these questions can be answered in the affirmative, the execution of the deed is not an act of bankruptcy (*Ex p Johnson, In re Chapman*, 1884, 26 Ch D 338) The assignment will not be invalid, although for a past debt arising from a previous loan, if made in pursuance of an absolute agreement entered into at the time of the loan But, if the giving of the bill of sale is purposely postponed until the debtor is in a state of insolvency, in order to prevent the destruction of his credit, which would result from registering the deed, such a transaction will not be protected, for the postponement is evidence of an intention to commit an actual fraud on the general body of the creditors (*Ex p Fisher, In re Ash*, 1872, L R, 7 Ch 636) And in all cases the person setting up such a prior agreement must prove its existence and good faith, and the reason for any delay in carrying it out So, where a debtor, shortly before his bankruptcy, in pursuance of a previous agreement, for valid consideration agreed to execute a further security "if required," and the request to execute the bill of sale was not made until several writs were out against the debtor, the bill of sale was held void as against the trustee in the debtor's subsequent bankruptcy (*Ex p Kulmer, In re Barker*, 1879, 13 Ch D 245) A bill of sale given for part of a debtor's property is on a different footing to a bill for the whole of such property The question then is, whether insolvency, or, in case of a trader, stoppage of business, is a necessary consequence of putting the instrument into force, but the validity of the transaction will depend to a large extent on all the circumstances

BILLS OF SALE (*cont*), (*index*, p 49)

of the case, and the proportion of the property assigned to the debtor's whole estate. The mere existence of a past consideration in this instance is not evidence of fraud, for everyone must have power to make over some part of his property, but if the transaction has for its object a fraud on creditors, it is an act of bankruptcy (*Siebert v Spooner*, 1836, 1 M & W, 174)

XI BILL OF SALE MAY BE FRAUDULENT PREFERENCE Two questions arise in considering whether a bill of sale is a fraudulent preference within the meaning of B A, 1883, s 48 (1) (see *Fraudulent Preference*) (a) Was the grantor unable from his own money to pay his debts as they became due, (b) Did he give his bill with a view to prefer the creditor. So, if a debtor gives to his creditor a bill of sale in pursuance of a binding contract, or in consequence of apprehended civil or criminal proceedings, or to avoid a distress, or in consequence of a demand or pressure by the creditor, without collusion, the transfer will not necessarily constitute a fraudulent preference.

Subject to the above provisions as to fraudulent preference, a bankrupt may give a bill of sale, provided (a) The bill is given before the date of the receiving order, (b) The person in whose favour the bill is given has not at the date of the bill notice of any available act of bankruptcy committed by the bankrupt before that time (see *Available Act of Bankruptcy*)

XII AVOIDANCE OF A BILL OF SALE AT COMMON LAW A bill of sale may fulfil all the conditions prescribed by the Acts, and yet be treated as fraudulent and void. It may have the effect of disturbing those relations which ordinarily exist between debtor and creditor. Credit is given to a man because, to all appearances, he is a man of substance. The owner of a factory or warehouse will have a large quantity of machinery and stock upon which a creditor may naturally rely, should the debtor's banking account prove insufficient to discharge a debt, the householder has furniture the sale of which may prove security for his rent. Assume it were possible for a man to assign all his goods and effects by a secret agreement, one of the terms of that agreement being that the assignor should be entitled to retain possession of the goods for the time being. In such circumstances persons dealing with

BILLS OF SALE (*cont*), (*index*, p 49)

the assignor might be misled It was early recognized, however, that assignments made in this way ought to be held void The leading authority upon this branch of law is known as *Twyne's Case*, 1601 (1 Sm, L C) The signs and marks of fraud were there declared to be (1) The generality of a gift, i e, the giving of all, or nearly all, the debtor's property, (2) The donor's continuance in possession, (3) The secrecy of the transaction, (4) And that it is made pending the writ So if Brown, sued by Smith, were to assign all the furniture in his house to Jones, the assignment would, in all probability, be declared void as against Smith, and the fact that the assignment was carried out by a valid bill of sale would be no protection Lord Coke advising those about to take an assignment of this kind said (in the case above mentioned) "Let it be made in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud Let the goods and chattels be appraised by good people to the very value, and take a gift in particular satisfaction of your debt Immediately after the gift, take possession of them, for continuance in possession in the donor is the sign of trust" In the case of a bill of sale, however, continuance in possession is not necessarily a sign of fraud In the case of an absolute bill, continuance in possession until an execution of a bankruptcy creates a strong, though not conclusive, presumption of fraud (*Edwards v Harben*, 1788, 2 T R 587), for if goods are absolutely assigned by one person to another, why should the assignor remain in possession? In the case of a conditional bill, however, continuance in possession, when consistent with the deed, is not even *prima facie* evidence of fraud unless such possession is a contrivance to defraud creditors (*Nunn v Wilsmore*, 1800, 8 T R 521)

BOARD OF TRADE (and see Annual Report of Trustee, p 30 Official Receiver and Staff of Board of Trade, p 207)

Generally The Board has power from time to time to issue general orders or regulations for the purposes of the Bankruptcy Acts and Rules (R 347) Judicial notice is taken of such orders, and they may be enforced by the court (B A, 1883, s 102) The numerous and varied powers and duties of the Board cannot be dealt with under this heading, but will be found elsewhere Thus,

BOARD OF TRADE (*cont*).

as to control which the Board may exercise over the trustee, see *Trustee*, p 327, as to audit of trustee's books by the Board of Trade, see *Accounts of Trustee*, p 6, and as to the appointment of a trustee by the Board of Trade, see *Trustee*, p 320. The Board also have power, in certain cases, to fix the trustee's remuneration (see *Trustee*, p 325) and to sanction expenses incurred by him when acting without remuneration (B A, 1890, s 15 (2)). As to the powers, etc., of the Board of Trade in relation to official receivers, see Rs 321-339.

Proceedings of All documents purporting to be orders or certificates made or issued by the Board, and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorised in that behalf by the President of the Board, are received in evidence, and deemed to be such orders or certificates without further proof, unless the contrary is shown (B A, 1883, s 140 (1)).

A certificate signed by the President of the Board that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade is conclusive evidence of the fact so certified (*ib*, (2)).

Appeals from Where an appeal to the High Court is given against any decision of the Board of Trade, or of the official receiver, the appeal shall be brought within twenty-one days from the time when the decision appealed against is pronounced or made (B A, 1883, s 139).

BONA FIDE SETTLEMENT (See Voluntary Settlement, p. 339)

BOND (and see Security)

A debt may be deemed to be paid in full where the debtor enters into a bond to secure it. (As to payment in full, see *Annulment of Adjudication*, p 31.)

A bail bond is not released by discharge (see *Discharge*, p 128).

Where a person is required to give security by the Bankruptcy Acts, he must in general give it by bond with sureties (see Rs 38-46).

BOOKS (and see Documents)

Of bankrupt Omission by a trader to keep proper books may prejudice his application for discharge if he subsequently become

BOOKS (cont)

bankrupt (see *Discharge of Bankrupt*, p 126) The official receiver has a right of access to the bankrupt's books (s 68) The Board of Trade may, on the application of the official receiver, direct that the debtor's books of account and other documents given up by him may be sold, destroyed, or otherwise disposed of (R 294)

Books of account belonging to the debtor in the hands of a third person must be delivered up No one can exercise a lien thereon (see R 349, and *Discovery, etc*, p 144) As to the use to which a bankrupt's books can be put in preparing a statement of affairs, see *Statement of Affairs*, p 303, as to mutilation of books, see *Fraudulent Debtors*, p 171, as to parting with books, see *ib*, p 171, and as to the consequences of failure by the debtor to deliver up books, see *ib*, p 170

Of trustee : (See *Accounts of Trustee*, p 4)

BREACH OF TRUST.

While a proof may be lodged for a debt founded on a breach of trust, discharge does not release a bankrupt from a debt incurred by fraudulent breach of trust (see *Discharge of Bankrupt*, p 128) The fact that he has been guilty of such fraud may also prejudice his discharge (see *ib*).

BUSINESS OF BANKRUPT.

A bankrupt may, by permission of the committee of inspection, carry on and manage his business, and may receive an allowance therefor (B A, 1883, s 64, R 325) When the trustee carries on the bankrupt's business he must keep a trading account (see *Trustee*, p 330)

A trader who obtains goods under the false pretence of carrying on business may render himself criminally liable (see *Fraudulent Debtors*, p 171)

CASH BOOK.

As to the requirements of the trustee's cash book, see *Accounts of Trustee*, p 6

CHAIRMAN. (See *Meetings of Creditors*)

CHATTELS (See *Personal Chattels*)

CHOSE IN ACTION

A chose (or thing) in action is defined elsewhere (see *Reputed Ownership*, p 275) Choses in action belonging to a bankrupt

CHOSE IN ACTION (*cont.*).

vest in, and are deemed to be duly assigned to the trustee (see *Trustee*, p. 334), but subject to equities (*in re Wallis, Ex p. Jerks*, 1902 1 K. B. 719). The reputed ownership clause does not generally apply to choses in action (see *Reputed Ownerships*, p. 274).

CLERGYMAN. (See *Realization of Property*, p. 259.)

CLERKS, SERVANTS, AND LABOURERS.

Persons in these classes are entitled to certain priorities over the other creditors of a bankrupt (see *Priority of Debts*, p. 232).

COMMENCEMENT OF BANKRUPTCY. (See *Title of Trustee*, p. 312.)

COMMITTAL OF DEBTOR (and see *Contempt of Court*).

As to the power of the court to make a receiving order in lieu of committal, see *Receiving Order*, p. 266: and as to the committal of a defaulting debtor, see *Duty of Debtor*, p. 155. Where the court commits any person to prison, the prison may be such convenient prison as the court thinks fit (B. A., 1883 s. 120).

COMMITTEE OF INSPECTION. (See also *Trustee*, sub. tit. *Powers exercisable by permission of Committee of Inspection*, p. 329.)

- (i) *Preliminary.*
- (ii) *Appointment of committee.*
- (iii) *Resignation and removal of members.*
- (iv) *Disabilities, etc., of members of committee.*
- (v) *Meetings of committee*, p. 77.
- (vi) *Powers and duties of committee.*
- (vii) *Where there is no committee.*

(i) *Preliminary*: In any bankruptcy where the creditors are numerous and the affairs of the bankrupt are much involved, it is often convenient to invoke the services of a statutory body known as a "Committee of Inspection". There is no committee of inspection in a "small" bankruptcy, but the official receiver may do, with the permission of the Board of Trade, all that a trustee may do with the permission of the committee (1883 s. 121).

(ii) *Appointment of committee*: The creditors qualified to vote may at their first or any subsequent meeting, appoint from among

COMMITTEE OF INSPECTION (*cont*), (*index*, p 75)

the creditors generally, or the holders of general proxies (as to which see p 198, *post*) or general powers of attorney from such creditors, a committee of inspection to superintend the trustee in his administration of the bankrupt's property. The committee must consist of not more than five nor less than three persons. A creditor who is appointed a member may not act until he has proved his debt, and his proof has been admitted (B A, 1883, s 22 (1), as amended by B A, 1890, s 5). If no committee is appointed, any function which is to be performed by the committee under the Act, may be performed by the official receiver (B A, 1883, s 22 (9) and B R 337).

(iii) *Resignation and removal of members*. A member of the committee may resign by giving written notice to the trustee (B A, 1883, s 22 (4)), or he may be removed by the creditors passing a resolution (*ib* (6)). If any member becomes bankrupt or compounds or arranges with his creditors, or is absent from five consecutive meetings, his office becomes vacant (*ib* (5)). On a vacancy occurring, the trustee may summon a meeting of creditors for the purpose of appointing a new member (*ib* (7)), but the continuing members may act notwithstanding the vacancy (*ib* (8)).

(iv) *Disabilities, etc., of members of committee*. No defect or irregularity in the appointment of a member of the committee will vitiate any act done by him in good faith (B A, 1883, s 143 (2)). He must not, except by leave of the court, either directly or indirectly by himself or any partner, clerk, agent or servant, become purchaser of any part of the estate (B R 316, and see *Trustee*, p 329), but this rule is not infringed by a partner purchasing on his own private account (*In re Gallard*, 1897, 2 Q B 8). A committee man may not, except under and with the sanction of the court, derive any profit from any transaction arising out of the bankruptcy (B R 317). Further, he may not, except with the sanction of the court, receive out of the estate any payment for services rendered by him in connection with the administration of the estate, or for any goods supplied by him to the trustee for or on account of the estate (*ib*). The sanction of the court must be obtained before the business is commenced from which the profit is to be derived (*In re Gallard*, *Ex p Gallard* (No 1), 1896, 65 L J Q B 199).

COMMITTEE OF INSPECTION (*cont*), (*index*, p. 75)

The order of the court must specify the nature of the service which the committee man desires to perform (B R 317A)

- (v) **Meetings of committee** The committee may meet at such times as they may appoint, and failing appointment not less than once a month (B A , 1883, s 22 (2)) They may act by a majority , but a majority of the members must be present before they can act at all (*ib* ss (3))

(vi) **Powers and duties of committee** . The committee of inspection may apply to the Board of Trade to authorise an account to be opened at a local bank (B A , 1883, s 74 (4)) , and may allow postponement of a dividend (*ib* , s 58 (2)) They may also give general directions to the trustee , but directions given by the creditors in general meeting must override those given by the committee It is the duty of the committee to audit the trustee's cash book not less than once in every three months (B R 288 , and see *Accounts of Trustee*, p 6) A member of the committee may also summon a meeting as to the trustee's removal (R 311) The committee also have power to allow the trustee to employ a solicitor or other agent to take any proceedings or do any business which they may sanction (B A , 1883, s 57 (3)) As to the powers, etc , of the trustee which are only exercisable by him by consent of the committee, see sub tit *Trustee* , and as to the review by the creditors of a resolution by the committee of inspection, see *ib*)

(vii) **Where there is no committee** If there be no committee, any act or thing, or any direction or permission, authorised to be done or given by the committee may be done or given by the Board of Trade on the application of the trustee (B A , 1883, s 22) , while in a small bankruptcy the duties of the committee of inspection are discharged by the official receiver (see *Small Bankruptcies*, p 297)

COMPANY

A limited liability company is not subject to the bankruptcy laws (see *Bankrupt*, p 44) A company may present a petition in the corporate name , and where it is in liquidation, the liquidator may petition in the name of the company (see *Petition*, p 218, and R 258).

COMPENSATION ON DISCLAIMER. (See Disclaimer of Onerous Property, p 135)

COMPLETED BY SEIZURE AND SALE (See Execution Creditor, p 159)

COMPOSITION OR SCHEME OF ARRANGEMENT. (See also Priority of Debts)

Generally

Advantages of a scheme

1 COMPOSITION OR SCHEME BEFORE ADJUDICATION

- (i) *Proposal of a composition by the debtor*
- (ii) *Form of proposal for a composition*
- (iii) *Form of proposal for a scheme*
- (iv) *Meeting to consider composition*
- (v) *Report of official receiver on proposal for composition or scheme and voting letter*
- (vi) *Resolution accepting scheme*
- (vii) *Consideration of appeal by the court, p 82, et seq*
 - (a) *Where scheme unreasonable, etc ,*
 - (b) *Where debtor guilty of misconduct ,*
 - (c) *Result of cases as to discretion of court ,*
 - (d) *Interests of the creditors to be considered ,*
 - (e) *What is "reasonable security" ?*
 - (f) *Effect of scheme on released debts*
- (viii) *Approval by the court, p 85*
 - (ix) *General effect of composition or scheme*
 - (x) *Debts not released by composition or scheme*
 - (xi) *Proof of composition*
 - (xii) *Annulment of a composition or scheme*
- (xiii) *Enforcement of composition or scheme, p 87, et seq*
 - (a) *Generally ,*
 - (b) *Application for enforcement ,*
 - (c) *Affidavit in support of application*
- (xiv) *Rights of bankrupt under composition or scheme, p 88, et seq*
 - (a) *Generally ,*
 - (b) *Vesting of property in ,*
 - (c) *Property acquired after approval ,*
 - (d) *Secret arrangement between debtor and creditor*
- (xv) *Trustee under composition*

2 COMPOSITION OR SCHEME AFTER ADJUDICATION, p 89

- (i) *Generally*
- (ii) *Annulment of bankruptcy on*

COMPOSITION OR SCHEME OF ARRANGEMENT (*cont.*).(iii) *Whether debts discharged by*(iv) *Default in making payments under*, p 90

1 COMPOSITION OR SCHEME BEFORE ADJUDICATION —

Generally From the point of view of the creditors as well as the debtor, it is often advantageous to have an adjustment of differences brought about otherwise than through the medium of an actual adjudication in bankruptcy. A debtor who is made bankrupt is subject to serious liabilities and disabilities. Further, if there is any possibility of a debtor "getting on his legs" once more, it is obvious that he can best do so if he has entered into a friendly arrangement with his whilom creditors.

Advantages of a scheme: The advantages of a scheme may be thus summarised (a) An increase in the assets, (b) A decrease in the liabilities, owing to relatives, etc., releasing debts, when they thereby tend to save their relation from bankruptcy, (c) A combination of these two.

It is therefore necessary to consider the methods by which a "composition" or "scheme of arrangement" can be effected. It may be made either before or after the debtor is adjudicated bankrupt, but must not be confused with a deed of arrangement, which is a form of settlement between a bankrupt and his creditors with which the court has little or nothing to do.

(1) *Proposal of a composition by the debtor* Where the debtor proposes to make a composition for the payment of his debts, or a scheme for the arrangement of his affairs, he must, within four days after making his statement of affairs, lodge a signed proposal with the official receiver setting out the terms of the scheme which he desires to submit to his creditors, and the particulars of any sureties or securities proposed (B A, 1890, s 3 (1))

(ii) *Form of proposal for a composition (No 81A) —*

(Title)

I, _____, the above-named debtor, hereby submit the following proposal for a composition in satisfaction of my debts

1 That payment in priority to all other of my debts of all debts directed to be so paid in the distribution of the property of a bankrupt shall be provided for as follows —

[Set out terms of proposal so far as relate to preferential claims]

2 That provision for payment of all the proper costs, charges, and expenses

COMPOSITION OR SCHEME (*cont*), (*index*, p 78)

of and incidental to the proceedings, and all fees and percentages payable to the Official Receiver and the Board of Trade shall be made in the following manner —

[*Set out proposal for provisions for fees, charges, costs, &c*]

3 That the following composition shall be paid as herein-after mentioned on all provable debts —

[*Set out terms of composition*]

4 That the payment of the composition be secured in the following manner
[*Set out full names and addresses of sureties (if any) and complete particulars of all securities to be given*]

Dated day of , 189
(Signed) (a)

[(a) *To be signed by the debtor, in case of joint debtors, to be signed in the firm name by such of the debtors as the Official Receiver shall require*]

(iii) Form of proposal for a scheme (No 81B) —

(Title)

I, , the above-named debtor, hereby submit the following proposal for a scheme of arrangement of my affairs in satisfaction of my debts

1 That—

[*Set out terms of scheme*]

2 That payment in priority to all other of my debts of all debts directed to be so paid in the distribution of the property of a bankrupt is provided for as follows —

[*Set out, or indicate by reference to the scheme, how it is proposed to satisfy preferential claims*]

3 That provision for payment of all the proper costs, charges, and expenses of and incidental to the proceedings, and all fees and percentages payable to the Official Receiver and the Board of Trade is provided for as follows —

[*Set out, or indicate by reference to the scheme, how it is proposed to provide for fees, costs, charges, etc*]

[*Set out any other terms*]

Dated this day of , 190
(Signed) (a)

[(a) *To be signed by the debtor or in the case of joint debtors, to be signed in the firm name by such of the debtors as the Official Receiver shall require*]

(iv) Meeting to consider composition The official receiver must send a copy of the proposed composition or scheme, together with a report thereon (see *infra*), to each creditor. He then holds a meeting of creditors before the debtor's public examination is concluded. If a majority in number of the creditors, and three-fourths in value who have proved, decide to accept the proposal, the same is deemed to be duly accepted by the creditors. When it is approved by the court it is binding on all the creditors (*ib* ss (2)). Notices sent out by the official receiver must be in the prescribed form (B R 196). At the meeting the debtor may amend his proposal, if the amendment is, in the opinion of the official receiver,

COMPOSITION OR SCHEME (*cont*), (*index*, p 78)

- calculated to benefit the general body of creditors (B A, 1890, s 3 (3)) The question whether a composition is to be accepted or not is considered at the first meeting of creditors (see *Meetings of Creditors*, p 193)

(v) Report of official receiver on proposal for composition or scheme and voting letter The official receiver writes a report (in F 82) as to the proposal, and the creditors then fill up a voting letter as follows —

VOTING LETTER (F 82)

(Title)

I, _____, of _____, a creditor in the above matter for the sum of _____, hereby request the Official Receiver of the said estate to record my vote [*Insert here the word "for" or the word "against," as the case may require*] the acceptance of the proposal as set forth in the report of the Official Receiver hereto annexed, and [*Creditors may, if they think fit, authorise the Official Receiver to vote "against" the proposal now submitted, but "for" such amendment thereof as may be satisfactory to the Official Receiver*] any amendment thereof which shall, in the opinion of the Official Receiver, be calculated to benefit the general body of the creditors

Dated this _____ day of _____, 190 _____,
Signature of Creditor,

Signature of Witness,
Address,

A creditor who has proved his debt may assent to or dissent from the proposal by letter addressed to the official receiver, so as to be received by him not later than the day before the meeting. Such assent or dissent has effect as if the creditor had been present at and had voted at the meeting (*ib* ss (4)). The acceptance by a creditor of a composition or scheme does not, however, release any person who under the Bankruptcy Acts, 1883 and 1890 would not be released by an order of discharge if the debtor had been adjudged bankrupt.

(vi) Form of resolution accepting a scheme of arrangement.—

(Title)

Minutes of resolutions come to and proceedings had at the first meeting of creditors held at _____ this _____ day of _____, 190 _____,
_____, Chairman

Resolved as follows [*Insert "unanimously" where the resolution is so carried*]

That the debtor's proposal for a scheme of arrangement as set forth in the paper writing hereunto annexed, and marked with the letter "A," be accepted. That upon the Court approving this scheme of arrangement, Mr _____ of _____, shall be the trustee thereunder at [*here state remuneration*]

That _____ shall be appointed the committee of inspection

COMPOSITION OR SCHEME (*cont*), (*index*, p 78)

under this scheme of arrangement for the purpose of superintending the administration of the debtor's property by the trustee, of whom [*insert number "two," or as the case may be*] shall form a quorum

That the provisions of section 22 of the Bankruptcy Act, 1883, shall, so far as the same are applicable, apply to the committee of inspection under this scheme

[*Here add any further resolutions that may be come to respecting the administration of the property, the carrying on and disposal of the debtor's business, etc , etc*]

F K , Chairman

NOTE —When a resolution is carried unanimously the creditors need not sign, but when a division is taken all creditors and holders of proxies voting should sign. The signatures must be attached at the meeting. Resolutions should be put separately

(vii) Consideration of the proposal by the court. After the proposal has been accepted by the creditors, the debtor or the creditor may apply to the court to approve it. Notice of the time for the application must be given to each creditor who has proved (B A , 1890, s 3 (5)) The application must not be heard until after the public examination of the debtor has been concluded, and any creditor may oppose it, although he may have voted for the acceptance of the proposal at the meeting of creditors (*ib* ss (6))

Before approving the proposal, the court hears the report of the official receiver as to the terms thereof and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor (*ib* ss (7))

The duty of the court in dealing with a debtor's proposal is as follows —

(a) *Where scheme unreasonable, etc* If, in the opinion of the court the terms of the proposal are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the court is required, where the debtor is adjudged bankrupt, to refuse his discharge, the court must refuse to approve the proposal (*ib* ss (8))

(b) *Where debtor guilty of misconduct, etc* Again, if any facts are proved, on proof of which the court would be required either to refuse, suspend, or attach conditions to the debtor's discharge were he adjudged bankrupt, the court must refuse to approve the proposal, unless it provides reasonable security for payment of not less than seven shillings and sixpence in the pound on all the

COMPOSITION OR SCHEME (*cont.*), (*under*, p 78)

unsecured debts provable against the debtor's estate (*ib* ss (9)) Note, however, the insertion of the words " not less " Cases have arisen in practice where debtors, having more than seven shillings and sixpence in the pound have propounded schemes for the payment of that sum Upon disclosure of the true facts such a scheme is at once rejected

Finally, in any other case the court may either approve or refuse to approve the proposal (*ib* ss (10))

(c) *Result of cases as to discretion of court* The result of these sub-sections has been said to be that the court *may* refuse its approval in all cases (*In re Burr, Ex p Board of Trade*, 1892, 2 Q B 467), and that it must refuse its approval in the cases mentioned in ss (8) and (9) Nor does it follow that the court must approve if the statutory amount is secured In *In re Burr (ubi supra)*, Lord Esher said " If seven and sixpence in the pound is secured, the court is not bound to approve the scheme That is the condition upon which the court is allowed to consider whether it will or will not approve the scheme If that condition is not fulfilled, the court cannot approve the scheme If that condition is fulfilled, the court may or may not, upon the other circumstances of the case, approve the scheme " But the court is not bound to refuse its approval because the debtor has committed offences which would have prevented his immediate unconditional discharge (*In re Genese, Ex p Kearsley*, 1886, 18 Q B D 168 , *In re Bottomley*, 1893, 10 Mor 262) A scheme will not be approved if there are no proofs for a number of debts mentioned in the statement of affairs (*Ex p Rogers*, 1884, 13 Q B D 438) A scheme which gives creditors no greater advantage than they would have in bankruptcy will not pass (*In re Aylmer*, 1887, 19 Q B D 33) As to what constitutes " unreasonable," it was held in *Ex p Clark*, 1884, (13 Q B D 426), that a scheme which provided that the debtor should be discharged " when the committee of inspection shall so resolve," was unreasonable

(d) *Interests of the creditors to be considered* In coming to a decision, the court will have regard to the public, commercial morality, and the interests of the creditors (*In re Barlow, Ex p Thornber*, 1886, 3 Mor 304, 309 , *In re E A B* , 1902, 1 K B 457)

COMPOSITION OR SCHEME (*cont*), (*index*, p 78)

The fact that a debtor has contributed to his bankruptcy by rash and hazardous speculation has been held not to be of itself sufficient ground for refusal (*In re E A B.*, *supra*)

(e) *What is reasonable "security"?* Where a bankrupt, whose business had been reported on as "rash and hazardous," proposed a scheme whereby all his property should vest in a trustee and be administered by him in his bankruptcy, fees, costs, and preferential debts to be paid at once, and the estate to be realised gradually until twenty shillings in the pound should be paid to all the creditors. It was held upon the facts that the scheme did not provide reasonable security for the payment of seven shillings and sixpence in the pound, and that it ought not to be approved by the court (*In re Flew*, 1905, 1 K B 278)

"Reasonable security for seven and sixpence in the pound" does not mean such security as it would be reasonable for a prudent man to invest his money upon (*In re Bottomley*, 1893, 10 Mor 262). In that case, Vaughan Williams, J, said (at p 273) "What is the meaning of 'reasonable security'?" I am of opinion that it does not mean such security as it would be reasonable that a prudent man should invest money upon. The reasonableness must, after all, be judged of according to the standard of the state of affairs presented to the creditors. The creditors had put before them a scheme by which it is suggested that an estate which will otherwise realise very little, will, if this scheme is carried through, very probably realise some nine or ten shillings in the pound. I believe that there is a reasonable chance of some such sum being obtained. That being so, am I to be stopped, or is the court to refuse to approve the scheme because there is not a sufficient reasonable security for the payment of not less than seven shillings and sixpence in the pound?"

(f) *Effect of scheme on released debts* Debts which have been released need not be provided for in the scheme (*In re E A B.*, 1902, 1 K B 457)

"That case," said Romer, L J, referring to *In re E A B.* (*supra*), in *In re Pilling*, 1903, 2 K B 50, at p 61, "decided two points, the first was that, where you find releases of debts brought about by arrangements to which the debtor was neither a

COMPOSITION OR SCHEME (*cont*), (*index*, p 78)

party nor privy, he is not prevented from having a composition effected with the other creditors approved by the court merely by reason of this arrangement which he did not bring about directly or indirectly. The other point of importance decided was this, that debts properly released between the date of the receiving order and the date of the composition under circumstances not touching the bankrupt need not be regarded in considering the scheme of composition" (See further as to releases, *In re Flew*, *supra*, and *In re Aton*, 1905, 21 T L R 693)

(viii) *Approval by the court* If the court approves the proposal, the approval may be testified by the seal of the court being attached to the instrument containing the terms of the proposed composition or scheme, or by the terms being embodied in an order of the court (*ib s s* (11)) The court may not, however, approve any scheme which does not provide for the payment in priority of all debts directed to be so paid in the distribution of the property of the bankrupt (*ib s s* (18)) (and see *Priority of Debts*, p 231)

(ix) *General effect of composition* A composition or scheme accepted and approved pursuant to the B A 1890, s 3, is binding on all the creditors so far as relates to any debts due to them from the debtor and provable in bankruptcy (B A, 1890, s 3 (12)), but it is not binding on any creditor so far as regards a debt or liability from which under the provisions of the B A, 1883, the debtor would not be discharged by an order of discharge in bankruptcy, unless the creditor assents to the composition or scheme (B A, 1883, s 19) For instance, a debt incurred by means of any fraud or fraudulent breach of trust would not be discharged (see B A, 1883, s 30) Debts in respect of which a composition is binding include all debts and liabilities which would be released by an order of discharge (*Flint v Barnard*, 1888, 58 L J Q B 53, see also *Seaton v Deerpurst*, 1895, 1 Q B 853)

(x) *Debts not released by scheme* A composition or scheme, however, does not release the debtor from any liability under a judgment against him in an action for seduction, or under an affiliation order, or under a judgment against him as a co-respondent in a matrimonial cause, except to such an extent and under such

COMPOSITION OR SCHEME (*cont*), (*index*, p 78)

conditions as the court expressly orders in respect of such liability (B A , 1890, s 3 (12)) It would seem that the onus of showing that there is special reason why the bankrupt should be discharged from such a debt is upon him (*In re Schumacher*, 1907, 23 T L R 336) In that case a mere statement by the debtor that the judge and jury were misled by false evidence in the divorce proceedings was held to be insufficient (See further, *Discharge of Bankrupt*)

(xi) Proof of composition A certificate of the official receiver that a composition or scheme has been duly accepted is, in the absence of fraud, conclusive evidence of its validity (B A , 1890, s 3 (13)) The provisions of the scheme may be enforced by the court on application by any person interested, and disobedience to any order made on the application is a contempt of court (*ib* (14))

(xii) Annulment of a composition or scheme Just as the court has power to approve, so it has power to annul a composition or scheme of arrangement in certain circumstances Although under the older Bankruptcy Acts the effect of failure on the part of a debtor to make payments in accordance with a composition or scheme was to remit the creditor to his ordinary rights and to expose the debtor to actions, it is now provided (B A 1890, s 3 (15)) that if default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the court, on satisfactory evidence, that the composition or scheme cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, or that the approval of the court was obtained by fraud, the court may, on the application of the official receiver, the trustee, or any creditor, adjudge the debtor bankrupt, and annul the composition or scheme Such an order, however, is made without prejudice to the validity of any sale, disposition, or payment duly made, or thing duly done under or in pursuance of the composition or scheme. Where a debtor is so adjudged bankrupt, any debt provable in other respects, which has been contracted before the adjudication, is provable in the bankruptcy.

Prospects of creditors considered: If there is a probability of the creditors gaining by an adjudication, the court will exercise

COMPOSITION OR SCHEME (*cont*), (*index*, p 78)

the powers conferred by the section. Thus it will adjudge the debtor a bankrupt if he has (even without fraud) misled the creditors as to the value of the assets (*Ex p Moon*, 1887, 19 Q B D 669). In that case, Cave, J, said (at p 672) "I think it is very important that it should be generally known that, when a debtor lays a proposal before his creditors which cannot be fully investigated by them, and by which he asks them to accept something less than they are entitled to under the law of bankruptcy, he is bound to exercise the utmost good faith, and, if he makes any material representation which is not true in fact, the creditors are entitled to have the arrangement which is founded upon that incorrect representation set aside."

(xiii) Enforcement of composition or scheme —

(a) *Generally* The Bankruptcy Rules make further provision for the protection of creditors, if the debtor fails to fulfil his obligations under a composition or scheme. Thus, if the debtor (or his trustee, if any) fail to make any payments thereunder, no action can be brought to enforce such payment, but the person aggrieved may make application to the court (R 211). If the composition or scheme is annulled, the property of the debtor vests automatically in the official receiver to whom the estate was originally assigned (R 212), and the trustee under the composition or scheme must account to the trustee in bankruptcy for any property of the debtor which has come into his hands, and pay over any money or property which has not been duly administered (R 213).

(b) Application for enforcement —*(Title)*

In the matter of a composition made by A B of
I, F M, of _____, do apply to this Court for an order for
the enforcement of the provisions of the said composition against
_____, on the grounds set forth in the annexed affidavit

Dated this _____

day of _____

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F M**(c) Affidavit in support of application —***(Title)*

In the matter of a composition made by A B of
I, F M, of _____, make oath and say —
1 That I am interested in the said composition, having proved my debt
as a creditor of the said A B [or as the case may be]

COMPOSITION OR SCHEME (*cont*), (*index*, p 78)

2 That [one] of the said provisions of the said composition is [or are] that [here set it or them out]

3 That has failed to comply with the said provisions [or as the case may be]

Sworn at, etc

F M

(xiv) Rights, etc, of bankrupt under composition or scheme —

(a) *Generally* The Bankruptcy Acts are silent as to the rights of a bankrupt whose property has been made the subject of an approved composition or scheme of arrangement

(b) *Vesting of property in* R 208 of the Bankruptcy Rules provides, however, that when a composition or scheme is approved, the official receiver shall, on payment of all proper costs, charges, and expenses of or incidental to the proceedings, and all fees and percentages payable to the official receiver and the Board of Trade, forthwith put the debtor (or, as the case may be, the trustee under the composition or scheme, or the other person or persons to whom under the composition or scheme the property of the debtor is to be assigned) into possession of the debtor's property. The court is also to discharge the receiving order. It would seem to follow from this that the debtor is entitled to deal with his property in the ordinary course of business

(c) *Property acquired after approval* It has at all events been decided that, the approval of a composition being equivalent to an order of discharge, the debtor is entitled to all property acquired after approval (*In re Croom*, 1891, 1 Ch 695), and in *In re A debtor*, 1908, 24 T L R 353, he was held entitled to redeem a security not redeemed by his trustee

(d) *Secret arrangement between debtor and creditor* The acceptance by a creditor of a bonus or gratuity beyond that secured by the deed will, if that bonus is paid with the debtor's knowledge, entitle any other creditor to avoid the deed (*Cockshott v Bennett*, 1788, 2 T R 763, *Ex p Milner*, 1885, 15 Q B D 605). An agreement made between a creditor and a third person for the purpose of giving that creditor an advantage over his fellows, may also be declared void. So in *McKewan v Sanderson*, 1875, (L R 20 Eq 65), a bank, after bankruptcy proceedings had commenced, took a guarantee from a brother of the debtor that their liability would not exceed £2,000,

COMPOSITION OR SCHEME (*cont.*), (*indec.*, p 78)

It was held that this was giving one creditor an advantage over others

(xv) Trustee under composition. If a trustee is appointed pursuant to a composition or scheme to administer the debtor's property, the provisions of the Bankruptcy Act, 1883, relating to trustees (*e.g.* s 27, providing for the discovery of the debtor's property (as to which see *Discovery*, p 142), and Pt V (ss 72-91), relating to trustees generally), are to apply to him (B A, 1890, s 3 (16)). The name of the trustee to be appointed must be mentioned in the scheme which is submitted to the creditors, otherwise a resolution by the creditors appointing him will be invalid. He must give security to the approval of the Board of Trade, as if he were trustee in the bankruptcy (R 210)

2 COMPOSITION OR SCHEME AFTER ADJUDICATION —

(i) Generally. If a debtor has been adjudged bankrupt, the creditors may at any time resolve to entertain a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs. Thereupon the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication (B A, 1883, s 23 (1)). The resolution which must be passed is similar to that which is necessary for accepting a proposal before adjudication (B A, 1890, s 6 (see p 81, *ante*)).

(ii) Annulment of bankruptcy on. If the court approves the composition or scheme, it may make an order annulling the bankruptcy and vesting the property in the bankrupt or some other appointed person on such terms and subject to such conditions, if any, as the court may declare (B A, 1883, s 23 (2)). Instead of making an order, the court may refuse or postpone the application for annulment (*In re Sullivan & Hughes*, 1904, 20 T L R 393). As to effect of the order, see *Ex p Wainwright*, 1881, 19 Ch D. 140, *Ex p Holmes*, *In re Wood*, 1880, 43 L T 447.

(iii) Whether debts discharged by. It would seem that the acceptance of a composition or scheme under this section, and the approval of the court, will operate only as a conditional discharge

COMPOSITION OR SCHEME (*cont*), (*index*, p 78)

of debts, that is to say, they will be discharged if the scheme is not annulled by a re-adjudication (see *Williams*, 8th Ed, p 86)

(iv) **Default in making payments under** If there is default in making payments under the scheme, or if the scheme cannot proceed without injustice or undue delay, or if the approval of the court has been obtained by fraud, the court may make an order for a fresh adjudication (B A, 1883, s 23 (3)) If such an order for re-adjudication is made, all debts contracted prior thereto will be provable thereunder, and the property of the debtor will re-vest in the official receiver

CONCEALMENT OF PROPERTY (See *Fraudulent Debtors*, p. 170)

CONSIDERATION

As to the statement of consideration which is necessary in order to validate a bill of sale, see *Bills of Sale*, p 62, as to consideration for a debt provable in bankruptcy, see *Petition*, p 221

CONSOLIDATION OF PETITIONS. (See *Petitions*, p 224)

CONTEMPT OF COURT.

An application to commit for contempt of court must be heard in open court (R 6), and must be supported by affidavits (R 85) A County Court judge may (s 100), but a registrar may not (s 99 (4)) commit for contempt A person who falsely represents himself to be a creditor (s 16), a witness disobeying an order or subpoena (R 70), a banker or agent of the bankrupt failing to deliver money to the trustee (s 50), and a person disobeying the provisions of a composition or scheme (1890, s 3 (14)) may be committed.

It is a contempt of court to bribe a debtor to give false answers in his public examination (see *Public Examination*, p 257) As to contempt of court by debtor who is in default, see *Duty of Debtor*, p 155 (See generally, Rs 70, 86)

CONTINGENT LIABILITIES

Certain contingent liabilities of a bankrupt must be entered in the *Statement of Affairs*, q v p 304 If incapable of being fairly estimated, they cannot be admitted to proof (see *Debts Provable in Bankruptcy*, p 109) As to the estimate of contingent liabilities by the trustee, see *ib* p 105

CONTRACTS OF DEBTOR.

Where at the date of the bankruptcy a debtor is under liability on an unprofitable contract, the trustee may disclaim the contract (see *Disclaimer*, p 131) It will be seen, however, that if he does not disclaim a contract within a certain time he will be deemed to have adopted it A person injured by the disclaimer may prove for his loss in the bankruptcy (see *ib* p 138), (see also *Property Divisible amongst Creditors*, p 244)

CONTROL OVER PERSON AND PROPERTY OF DEBTOR.

(i) ARREST

- (a) *Debtor absconding*
- (b) *Removing or concealing goods*
- (c) *Removing goods value £5*
- (d) *Failing to attend examination*

(ii) WARRANT FOR ARREST

(iii) RE-DIRECTION OF DEBTOR'S LETTERS

(i) ARREST The court may, in certain cases, cause a debtor to be arrested, and any books, papers, money and goods in his possession to be seized and kept in safety until such time as the court may order An order for arrest may be made in any of the following cases —

(a) *Debtor absconding* If after a bankruptcy notice (see *Bankruptcy Notice*, p 47) has been issued, or after presentation of a bankruptcy petition by or against him, it appears to the court that the debtor has absconded or is about to abscond with a view (i) Of avoiding payment of the debt in respect of which the bankruptcy notice was issued, or (ii) Of avoiding service of a bankruptcy petition, or (iii) Of avoiding appearance to any such petition, or (iv) Of avoiding examination in respect of his affairs, or (v) Of otherwise avoiding, delaying, or embarrassing proceedings in bankruptcy against him (B A, 1883, s 25, as amended by B A, 1890, s 7)

(b) *Removing or concealing goods* If after presentation of a bankruptcy petition by or against him, it appears to the court that there is probable cause for believing that he is about to remove his goods with a view to preventing or delaying possession being taken of them by the official receiver or trustee, or that there is probable ground for believing that he has concealed or is about to

CONTROL OVER PERSON AND PROPERTY OF DEBTOR (cont.)

conceal or destroy any of his goods, or any books, documents or writings which might be of use to his creditors in the course of his bankruptcy (s 25)

(c) **Removing goods value £5 :** If, after the service of a bankruptcy petition on him, or after a receiving order is made against him, he removes any goods in his possession above the value of £5, without the leave of the official receiver or trustee

(d) **Failing to attend examination** If, without good cause shown, he fails to attend any examination ordered by the court Provided that no arrest upon a bankruptcy notice shall be valid and protected, unless the debtor before or at the time of his arrest shall be served with such notice (B. A., 1883, s 25)

(ii) **WARRANT FOR ARREST** A warrant must be addressed to such officer of the High Court, or to such bailiff or officer of the County Court as the court may in each case direct (B R 83) The governor or keeper of the prison to whom the debtor is entrusted must produce the debtor when required Books, papers, etc., which are seized under a warrant, must be lodged with the official receiver or trustee, as the case may be (B R 84)

The power to issue a warrant extends to the case of a debtor who has absconded before the issue of a notice or the presentation of a petition (*R v Northallerton County Court Judge*, 1898, 2 Q B 680, 1899, A C 439) A door may be broken open in order to effect the arrest Application for a warrant should not be lightly made, inasmuch as an action lies for malicious arrest But in order to succeed in such an action the plaintiff must prove (a) The rescission of the order for arrest, (b) That the order was obtained maliciously and without reasonable and probable cause, and (c) That the party obtaining the order imposed upon the court by some *suggestio falsi* or *suppressio veri* (*Daniels v Fielding*, 1846, 16 M & W 200, 207)

(iii) **RE-DIRECTION OF DEBTOR'S LETTERS** After a receiving order has been made the court may, on the application of the official receiver, direct that all letters sent through the post to the debtor shall be re-directed to the official receiver or trustee (B A, 1883, s 26)

CONVEYANCE OR ASSIGNMENT FOR BENEFIT OF CREDITORS GENERALLY. (See Acts of Bankruptcy, p 10)

COPYHOLD

- As to realisation of copyhold property by a trustee, see *Trustee*, p 334

CO-RESPONDENT.

Damages payable by a co-respondent are not released by his discharge (see *Discharge*, p 130)

CORPORATIONS.

A corporation cannot be made bankrupt (see *Bankrupt*, p 44) For the purposes of the Bankruptcy Act, a corporation may act by any of its officers authorised in that behalf under seal (B A , 1883, s 148)

COSTS (and see Scale of Solicitors' Costs)

- (1) *Generally*
- (2) *In action against trustee or official receiver*
- (3) *Of proving debt, etc*
- (4) *Of summoning creditors' meeting*
- (5) *Of witnesses*
- (6) *Of petition*
- (7) *Of trustee*
- (8) *Of sheriff*
- (9) *Of official receiver*
- (10) *Of solicitor, p 94*
- (11) *Of disclaimer*
- (12) *Joint and separate estates*
- (13) *Scales of costs*
- (14) *Appeal as to costs*
- (15) *Taxation of costs*
- (16) *Whether costs provable in bankruptcy*
- (17) *Summary of rules as to costs, p 95*

(1) *Generally* The costs of any proceeding in bankruptcy are in the discretion of the court , but where an issue is tried by a jury, they follow the event, unless the court otherwise orders (B A , 1883, s 105 (1)) The court may order costs to be taxed as between party and party, or as between solicitor and client, or may award full costs, or fix a sum to be paid in lieu of taxed costs (R 108)

COSTS (cont)

An appellant to the Court of Appeal may be compelled to deposit £20 as security for costs (R 331) A trustee may be compelled to personally pay the costs of an unsuccessful appeal (*In re Malden*, 1886, 3 Mor 185), or of a successful appeal where he is respondent (*In re Mackenzie*, 1899, 2 Q B 566) As to costs in summary cases, see *Small Bankruptcies*, p 299

(2) **In action against trustee or official receiver** In an action brought against the trustee or official receiver as representing the debtor, the defendant is not personally liable for costs unless the court otherwise directs (R 108 (3))

(3) **Of proving debt, etc.** A creditor must bear the costs of proving his debt, unless the court otherwise orders He must also bear the costs of amending the valuation of his security and proof (Sch II, Rs 6, 13)

(4) **Of summoning creditors' meeting** A creditor who summons a meeting of creditors must pay the cost, but it is repaid to him out of the estate if the creditors or the court so direct (R 254)

(5) **Of witnesses** The costs of witnesses may be allowed, whether they are examined or not, but their allowances must not exceed those provided in the official scale of costs (Rs 61-65)

As to the costs of a witness summoned to make discovery of a debtor's property, see *Discovery*, etc, p 144

(6) **Of petition** The petitioning creditor must bear all the costs incurred down to the receiving order Such costs, however, including the costs of a bankruptcy notice, are to be taxed and paid out of the estate in priority, as provided by Rs 125, 183 A petitioning creditor may in certain cases be compelled to give security for costs (R 148, and see *Security*, p 292)

(7) **Of trustee** (See *Trustee*, and *Accounts of Trustee*) As to the costs of an application by the trustee to the court for directions, see *Trustee*, p 326

(8) **Of sheriff** As to sheriff's cost of execution, see *Sheriff*

(9) **Of official receiver** (See *Official Receiver*, p 211)

(10) **Of solicitor** (And see *Scale of Solicitor's Costs*, p 276) A solicitor employed by the trustee has no lien on the estate for costs (*In re Humphreys*, 1898, 1 Q B 520), and the court will not often make a charging order under s 28 of the Solicitors' Act, 1860 In presenting his bill, the solicitor must give credit for any sum or

COSTS (cont)

security he may have received as a deposit for future expenses from a debtor presenting a petition (R 113) Where the estimated assets of the debtor do not exceed £300, only three-fifths of the ordinary charges are allowed (see R 112 (2))

This rule only applies to costs directed to be paid out of the estate (*In re Dowson*, 1888, 21 Q B D 417), and does not apply to conveyancing (*In re Palfitt*, 1889, 23 Q B D 40)

(11) **Disclaimer** Where a trustee applies to the court to disclaim a lease, the costs of the landlord, etc , will not be allowed unless specially ordered (R 320 (5))

(12) **Joint and separate estates** When the joint estate of two debtors is insufficient to pay costs, the separate estate may be applied in the circumstances mentioned in R 128

(13) **Scales of costs** (See *Scale of Solicitor's Costs*)

(14) **Appeal as to costs** There is no appeal as to costs to the Court of Appeal, except by leave of the court (R 129)

(15) **Taxation of costs** The costs of solicitors, managers, accountants, auctioneers, and brokers must all be taxed (s 73) If the taxation has been done by the registrar of a County Court, the Board of Trade may direct that it be reviewed by a taxing master of the High Court (R 124)

(16) **Whether costs provable in Bankruptcy** As to whether costs are provable in bankruptcy, see *Debts Provable in Bankruptcy* p 106

(17) **Summary of rules as to costs** Rs 108-128, which relate to costs, may be summarised as follows power of court to award costs (108), taxation (110), registrar to tax in person (111), scale of costs (112 (1)), lower scale if estate under £300 (112 (2)), re-taxation when assets realise less than certain amounts (112A), costs of solicitor of petitioning debtor (112B), solicitor's costs in case of debtor's petition (113), costs paid otherwise than out of estate (114), filing of bills of costs (115), register of taxed bills (115), certificate of employment of solicitor, accountant, etc (117), sheriff's costs (118, 119A), taxation of sheriff's costs (119), applications for costs (123), review of taxation by Board of Trade (124), priority of costs and charges payable out of estate (125), shorthand notes (125A), disallowance of costs of unnecessary petition (126), apportionment of costs in case of partnership (127), costs out of joint or separate estates (128)

COUNSEL

The official receiver may employ counsel to appear at the public examination (see *Public Examination*, p 256) As to employment of counsel by the trustee, see *Trustee*, p 331

COUNTER-CLAIM (See *Bankruptcy Notice*, pp 19, 48)

COUNTY COURT (See *Courts*.)

COURTS

- (i) **GENERALLY**
- (ii) **JURISDICTION EXERCISED BY HIGH COURT AND COUNTY COURTS**
- (iii) **BANKRUPTCY JUDGE OF HIGH COURT**
- (iv) **JURISDICTION IN CHAMBERS**
- (v) **PETITION, WHERE TO BE PRESENTED, p 98, et seq**
 - (a) *Generally*
 - (b) *London bankruptcy district*
 - (c) *Metropolitan County Courts*
 - (d) *Local County Courts*
 - (e) *Residence of debtor*
 - (f) *Petition in wrong court*
- (vi) **TRANSFER OF PROCEEDINGS FROM COURT TO COURT, p 98**
- (vii) **POWERS OF BANKRUPTCY COURTS, p 99 et seq**
 - (a) *Generally*
 - (b) *Court not to be restrained*
 - (c) *Trial by jury*
 - (d) *Transfer of proceedings*
 - (e) *Committal of defaulting debtors*
- (viii) **POWERS OF COUNTY COURTS, p 100**
 - (a) *Generally*
 - (b) *To state a case*
- (ix) **ENFORCEMENTS OF ORDERS AND WARRANTS**

COURTS (See also *Appeal*, *Open Court*, *Registrar*, *Stay of proceedings*)

(i) **GENERALLY** The expression "court" means the court having jurisdiction in bankruptcy under the Act, while High Court means His Majesty's High Court of Justice (s 168)

(ii) **JURISDICTION EXERCISED BY HIGH COURT AND COUNTY COURTS** The courts having jurisdiction in bankruptcy are the High Court and the County Courts (s 92 (1))

COURTS (*cont*), (*index*, p 96)

The Lord Chancellor may, however, exclude any County Court from having jurisdiction in bankruptcy, and for the purposes of bankruptcy jurisdiction may attach its district or any part thereof to the High Court, or to any other County Court or Courts. He may also detach the district of any County Court, or any part thereof, from the district and jurisdiction of the High Court (*ib* (2))

The term "district," when used with reference to a County Court, means the district of the court for the purposes of bankruptcy jurisdiction (*ib* (3))

A County Court which, at the commencement of the Act, is excluded from having bankruptcy jurisdiction, continues to be excluded until the Lord Chancellor otherwise orders (*ib* (4))

Periodical sittings for the transaction of bankruptcy business by County Courts having jurisdiction in bankruptcy are holden at such times and at such intervals as the Lord Chancellor shall prescribe (*ib* (5))

The London Bankruptcy Court is now consolidated with the Supreme Court of Judicature (s 93)

(iii) **BANKRUPTCY JUDGE OF HIGH COURT** All matters in respect of which jurisdiction is given to the High Court by the Act of 1883 may be assigned to such division of the High Court as the Lord Chancellor directs (s 94), and shall be assigned by him to a particular judge of that court. At the time of writing Mr Justice Bigham is bankruptcy judge

(iv) **JURISDICTION IN CHAMBERS** Subject to the provisions of the Act, and to general rules, the judge of the High Court exercising jurisdiction in bankruptcy may exercise in chambers the whole or any part of his jurisdiction (s 98)

Certain proceedings, such as the public examination, must be heard in court (see also R 6)

During vacation, or during the illness of the bankruptcy judge, or during his absence or for any other reasonable cause, such matters, or any part thereof, may be transacted and disposed of by or under the directions of any judge of the High Court named for that purpose by the Lord Chancellor (s 94 (3)) (For rules relating to the business of the High Court, see Rs 100-107)

COURTS (*cont*), (*index*, p 96)

(v) PETITION, WHERE TO BE PRESENTED —

(a) **Generally** If the debtor against or by whom a bankruptcy petition is presented has resided or carried on business within the London bankruptcy district for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any County Court, or is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition must be presented to the High Court (95 (1))

In any other case the petition must be presented to the County Court for the district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition (*ib* (2))

Nothing in this section invalidates a proceeding by reason of its being taken in a wrong court (*ib* (3))

(b) **London Bankruptcy District** This includes the city of London and the liberties thereof, and all such parts of the metropolis and other places as are situated within the district of any metropolitan County Court (s 96)

(c) **Metropolitan County Courts** These are the County Courts for Bloomsbury, Bow, Brompton, Clerkenwell, Lambeth, Marylebone, Shoreditch, Southwark, Westminster, and Whitechapel (B A , 1883, Sch III)

(d) **Local County Courts** These are the provincial County Courts, except such as are excluded by order under s 92 (*supra*)

(e) **Residence of debtor** The onus of proving the whereabouts of the debtor's residence is on the petitioning creditor, but unless there is reason to believe that he will dispute it, evidence need not be adduced in the first instance (*Ex p Baine*, 1886, 16 Q B D 522) The petition should, by preference, be presented in the district where the debtor has his place of business (R 145).

(f) **Petition in wrong court**: Where a petition is presented to the wrong court, that court can make a receiving order (*Ex p May, In re Brightmore*, 1884, 14 Q B D 37), but not where the petition is wilfully presented in the wrong court (*ib* per Cave, J)

(vi) **TRANSFER OF PROCEEDINGS FROM COURT TO COURT** Subject to the provisions of the Act, every court having original jurisdiction

COURTS (*cont*), (*index*, p 96)

in bankruptcy shall have jurisdiction throughout England (s 97 (1)), and proceedings in bankruptcy may be transferred from one court to another, or may be retained in the court in which the proceedings were commenced, although it may not be the court in which the proceedings ought to have been commenced (*ib* (2))

As to order of transfer by High Court judge, see R 18, by County Court judge, R 19, and as to notice of transfer, see R 24

(vii) POWERS OF BANKRUPTCY COURTS —

(a) **Generally** A bankruptcy court has power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognisance of the court, or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property (B A, 1883, s 102 (1))

This jurisdiction cannot, however, be exercised by the County Court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties consent thereto, or the money, money's worth, or right in dispute does not in the opinion of the judge exceed in value £200 (*ib*) As to what is a claim arising out of the bankruptcy, see *In re Hawke, Ex p Scott*, 1885, 16 Q B D 503, *Ex p Beesty*, 1882, 13 Q B D 238 It seems that the term "bankruptcy" includes "composition" (see *Ex p Hartel, In re Thorpe*, 1873, L R 8 Ch 743) See generally on this sub-section, Williams, pp, 322-329 As to power of trustee to apply to the court for directions, see *Trustee*, p 326

(b) **Court not to be restrained** A court having jurisdiction in bankruptcy cannot be restrained in the execution of its powers by the order of any other court, nor shall any appeal lie from its decisions, except in manner directed by the Act (s 102 (2)) Appeals are provided for by s 104 (and see *Appeal*, p 35)

(c) **Trial by jury** If in any proceeding in bankruptcy there arises any question of fact which either of the parties desire to be tried before a jury, or which the court thinks ought to be tried by a jury, the court may direct trial with a jury (s 102 (3)) The question of the existence of a trade custom to exclude the doctrine

COURTS (*cont*), (*index*, p 96)

of reputed ownership is one proper for trial with a jury (*In re Jensen, Ex p Callow*, 1886, 4 Mor 1) see Rs 6N 94-97

(*d*) Transfer of proceedings . Where a receiving order has been made by a judge in the High Court, the judge may order the transfer to him of any action pending in any other division, brought or continued by or against the bankrupt (*ib* s 102 (4))

(*e*) Committal of defaulting debtor, etc. Where default is made by a trustee, debtor, or other person in obeying any order given by the Board of Trade, or by an official receiver, or any other officer of the Board, the court may order such defaulting trustee, debtor, or person to comply with the order or direction so given , and may make an immediate order for the committal of such defaulting trustee, debtor, or other person , provided that the power given by this sub-section shall be deemed to be in addition to, and not in substitution for, any other right or remedy in respect of such default (s 102 (5)) Thus the Board may order a trustee under a scheme to account under s 78, although he has been removed, and may apply to enforce the order under this sub section (*In re Rogers, Ex p B T* , 1887, 4 Mor 67) As to applications to commit, see Rs 6F, 86, 87

(VIII) POWERS OF COUNTY COURT —

(*a*) Generally A County Court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the court, have all the powers and jurisdiction of the High Court, and the orders of the court may be enforced accordingly in manner prescribed (B A , 1883, s 100) A County Court judge cannot, however, restrain an action in the High Court (*Ex p Reynolds, In re Barnett*, 1885, 15 Q B D 169) , but he may commit for disobedience to a summons under s 27 (*R v Croydon County Court Judge*, 1884, 13 Q B D 963)

(*b*) To state a case If any question of law arises in any bankruptcy proceedings in a County Court which all the parties desire, or which one of them and the judge may desire, to have determined in the first instance in the High Court, the judge must state a special case for the opinion of the High Court The special case and the proceedings, or such of them as may be required, are transmitted to the High Court for the purposes of the determination (s 97 (3))

COURTS (*cont*), (*index*, p 96)

An appeal lies from the bankruptcy judge to the Court of Appeal (*Ex p Dawes, In re Moon*, 1886, 17 Q B D 275)

- (1x) ENFORCEMENT OF ORDERS AND WARRANTS OF COURT Orders and warrants of court may be enforced throughout the United Kingdom (B A , 1883, s, 117), while the High Court, the County Courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency, must act in aid of each other in all matters of bankruptcy (*ib* , s 118)

CREDIT.

As to the liability of a debtor who obtains credit on false representations, see *Fraudulent Debtors*, p 171

CREDITORS.

Defined The term creditor (as used in the bankruptcy rules) includes a corporation, and a firm of creditors in partnership (R 3)

Generally As the rights, duties, and liabilities of creditors form a large part of this work, it were impossible to collect all the information under one heading The following references are therefore given —

Absence of, at hearing of petition, p 229

Action by, in name of trustee, p 330

Administration Orders, remedies of creditors under, p 28

Appeal by, against act of trustee, p 36

Appointment of trustee by, p 318

Bankruptcy Notice by (see *Bankruptcy Notice*)

False claim by, consequence of, p 160

Final Judgment, what creditor can enforce, p 19

Final Judgment, creditor who has obtained, p 19

Joint, right of to lodge petition, p 218 (and see *Partners and Joint Debtors*)

List of (see *List of Creditors*)

Meetings of (see *Meetings of Creditors*)

Non-appearance of, at hearing of petition, p 229

One Creditor, where debtor has only, p 222

Petition by debtor's only creditor, p 222

Preferred Creditors, p 231

Removal of trustee by, p 321.

CREDITORS (*cont*)

Remedies of, how affected by receiving order, p 262.

Right of, to convene creditors' meeting, p 196

Right of, to inspect trustee's accounts, p. 4

Right of, to see trustee's accounts, p 4

Right of, to take part in public examination, p 256

Rights of creditor who has not proved his debt before declaration of dividend, p 148

Secured (see *Secured Creditor*)

Trustee, appointment of by creditors, p 318

Voting letter of, p 81

CRIMINAL LIABILITY (See *Fraudulent Debtors.*)**CROWN**

The provisions of the B A , 1883, as to remedies against the property of a debtor, priority of debts, the effect of a composition or scheme, and the effect of discharge, all bind the Crown (B A , 1883, s 150) Otherwise the Crown is not bound by the Act Debts due to the Crown are not released by discharge (see *Discharge*, p 128)

CUSTOM

A trade custom, whereby a bankrupt holds goods which are not his property, may have effect to take those goods out of his " order and disposition " Thus it is universally known that an hotel keeper often hires the furniture in his hotel In such a case the furniture would not be in the order and disposition of the hotel keeper (see *Reputed Ownership*, p 273)

DAMAGES

Demands in the nature of unliquidated damages, arising otherwise than by reason of a contract, promise, or breach of trust, are not provable in bankruptcy (B A , 1883, s 37 (1)) See also *Debts Provable in Bankruptcy*, p 106

DEALINGS WITH BANKRUPT (See *Protected Transactions*)**DEATH** (and see *Deceased Insolvent Debtor*)

In case of the death of the debtor or his wife, or of a witness whose evidence has been received by any court, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, is

DEATH (*cont*)

- admitted as evidence of the matter therein deposed to (B A , 1883 s 136) S 1 of the Prof Payments in Bankruptcy Act, 1888, applies to the case of a deceased person who dies insolvent As to the effect of debtor's death after presentation of petition see *Petition*, p 224, as to death before service of petition, see R 156A and as to the right of a landlord against the estate of a debtor who dies insolvent, see *Landlord and Tenant*

DEBENTURES

Debentures are choses in action (see *Reputed Ownership*, p 275) They are not bills of sale within the Act of 1882 (see *Bills of Sale*, p 56)

DEBTOR (See also Control over Person and Property of Debtor)

The term " debtor," as used in the rules, includes a firm of debtors in partnership, and any debtor proceeded against under the Act, whether adjudged bankrupt or not (R 3)

As a large part of this work is concerned with debtors, it would be impracticable to deal with all their rights, duties, and liabilities under this head The following table may, however, be useful —

Arrest of (see *Control over Person and Property of Debtor*, p 91)

Attendance of, at first meeting (see *Meetings of Creditors*)

Death of (see *Death*)

Discovery of property of (see *Discovery of Property*, etc)

Duties of (see *Duty of Debtor*)

Fraudulent (see *Fraudulent Debtor*)

Proposal for composition or scheme by (see *Composition or Scheme of Arrangement*)

DEBTORS ACT, 1869.

As to offences under this Act, see *Fraudulent Debtors*, p 169

DEBTOR'S PETITION.

As to when the court will annul an adjudication made on the debtor's petition, see *Annulment of Adjudication*, p 32

DEBTS. (See Debts Provable in Bankruptcy.)

DEBTS AFFECTED BY ORDER OF ANNULMENT. (See Annulment of Adjudication, p 31)

DEBTS DUE TO BANKRUPT.

These must be entered on the statement of affairs in a particular way (see *Statement of Affairs*, p 305).

DEBTS PROVABLE IN BANKRUPTCY. (See also Proof of Debts.)

(a) *Generally*

(b) *Provisions of s. 37 as to* (1) *Unliquidated damages*, (2) *Where creditor has notice of act of bankruptcy*, (3) *Debts provable*, (4) *Estimate of debts*, (5) *Appeal from estimate by trustee*, (6) *Where liability cannot be estimated*, (7) *"Liability" defined*

(c) *Costs*, p 106.

(d) *Annuities*

(e) *Damages for torts*

(f) *Loans to traders, and by wife to husband*

(g) *Debts not provable by the general policy of the law*

(h) *Miscellaneous debts not provable*, p 107

(i) *Miscellaneous debts provable*, p 108.

(j) *Contingent liabilities.*

(k) *Who may prove*

(l) *Holders, etc, of bills of exchange*

(a) *Generally* Not every claim against the estate of a bankrupt can be made provable in the bankruptcy, and before presenting a petition or seeking to prove a debt, a creditor must be satisfied that his debt is provable (As to debts payable at a future time, see *Proof of Debts*, p 240)

(b) *Provisions of s 37 as to* The law relating to debts provable in bankruptcy is to be found in s 37 of the Bankruptcy Act, 1883, the various sub-sections of which may be discussed as follows —

(1) *Unliquidated damages* Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy (s s. (1))

(2) *Where creditor has notice of act of bankruptcy* A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice

DEBTS PROVABLE IN BANKRUPTCY (*cont.*) (*infra*, p 104)

(3) *Debts provable* Save as aforesaid all debts and liabilities, present or future certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy

(4) *Estimate of debts* An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value (see par (1), p 109, *infra*)

(5) *Appeal from estimate by trustee* Any person aggrieved by any estimate made by the trustee as aforesaid, may appeal to the court

(6) *Where liability cannot be estimated, etc* If in the opinion of the court the value of the debt or liability is incapable of being fairly estimated, the court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy If, in the opinion of the court the value of the debt or liability is capable of being fairly estimated the court may direct the value to be assessed before the court itself without the intervention of a jury, and may give all necessary directions for this purpose, and the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy

(7) "*Liability*" *defined* Liability shall for the purpose of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur, or capable of occurring, before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking to pay or capable of resulting in the payment of money or money's worth, whether the payment is, as respects amount, fixed or unliquidated, as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies, as to mode of valuation, capable of being ascertained by fixed rules or as matter of opinion

DEBTS PROVABLE IN BANKRUPTCY (*cont.*), (*index*, p 104)

(c) **Costs** The costs of a successful defendant are provable in the bankruptcy of the plaintiff although they may not have been taxed at the date of adjudication (*Ex p Peacock, In re Duffield*, 1873, L R 8 Ch 682) Such a debt may be included in a composition, and the debtor must pay the costs on the amount inserted in his statement although they are not taxes at the time for composition (ib) The costs of a successful plaintiff may, however, only be proved in the defendant's bankruptcy in cases where the debt or claim in respect of which the costs are recoverable is itself provable (*Ex p Newman, In re Brooke*, 1876, 3 Ch D 497) This is because "The costs being a mere addition or appurtenance to the damages must follow the same rule as that to which they are attached"

(d) **Annuities** Where the debtor is under obligation to pay an annuity for life to some person, the annuitant may prove in the bankruptcy for the annuity (*Ex p Jackson*, 1872, 27 L T 696, *Ex p Neal, In re Batey*, 1880, 14 Ch D 579), even though the annuity be contingent upon the performance or non-performance of some act by the payee himself So the value of an annuity payable to a woman during her life, but defeasible in the event of her marrying again, may be proved for (*In re Blakemore*, 1877, 5 Ch D 372)

(e) **Damages for torts** The section makes it clear that claims for unliquidated damages cannot be proved for unless, generally speaking, they are founded in contract Unliquidated damages for a tort cannot be proved for Thus, while a man might prove for the damage sustained by him owing to a breach of contract, he could not prove in respect of damages for an alleged libel, or for trespass It is otherwise if damages for a tort are agreed before the bankruptcy (as in *Ex p Mumford*, 1808, 15 Ves 289), or if judgment in an action for tort is signed before the bankruptcy (as in *Ex p Newman, In re Brooke*, 1876, 3 Ch D 494)

(f) **Loans to traders, and by wife to husband** Where money is lent to a trader under a written contract by which the lender is to receive a rate of interest varying with the profits, or a share of profits in consideration for the sale by him of the goodwill of the business and the trader becomes bankrupt, the lender cannot recover anything in the bankruptcy until the claims of other creditors have been satisfied (*Partnership Act*, 1890, s s 2, 3) An

DEBTS PROVABLE IN BANKRUPTCY (*cont.*), (*under*, p 104)

agreement for a fixed sum out of the profits is within these sections (*In re Young Ex p Jones*, 1896 2 Q B 484 and see also as to these sections *In re Mason Ex p Bing*, 1899, 1 Q B 810)

Again where a wife lends or entrusts money or estate to her husband for the purposes of his trade or business, such money or estate are to be treated as assets in his bankruptcy, subject to the right of the wife to claim as a creditor after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied (*Married Women's Property Act*, 1882, s 3) This provision only applies to loans made to the husband for his trade or business (*Ex p Tidswell*, 1887, 4 Mor 219, *In re Clark, Ex p Schulze*, 1898, 2 Q B 330)

(g) Debts not provable by the general policy of the law Debts founded on felony cannot be proved for unless the creditor has taken the necessary steps to have the offender punished So, if a man had property stolen, he could not prove for its value in the bankruptcy of the thief unless he had taken the necessary steps to bring him to justice (see generally, *Ex p Ball, In re Shepherd*, 1879, 10 Ch D 667) It is stated, however, in *Williams on Bankruptcy*, p 129, "Probably now a proof would be admitted for a debt founded in felony unless it was shown that the creditor seeking to prove was omitting to perform some duty in connection with the prosecution of the felon "

A debt which is founded on an illegal consideration, such as a gaming debt, cannot be proved (*Ex p Chavasse*, 1865, 34 L J Bank, 17) Where a balance resulting from gambling transactions on the Exchange cannot be recovered, as there is no consideration, no proof can be admitted in respect of non-delivery (*In re Cronmure, Ex p Wand* 1898, 2 Q B at p 395) See also as to gaming debts (*In re Browne*, 1904, 1 K B 139)

(h) Miscellaneous debts not provable The following debts cannot be proved in bankruptcy—Future payments of alimony (*Linton v Linton*, 1885, 15 Q B D 239, and see *Kerr v Kerr*, 1897, 2 Q B 439), debts barred by the Statute of Limitations (*Ex p Ross* 1827, 2 Gl and J 330), debts contracted by an infant, on his becoming bankrupt when of full age, unless they are for necessities or for liquidated damages for torts (see 37 & 38 Vict c 62) With regard to penalties for breach of contract, it is to be

DEBTS PROVABLE IN BANKRUPTCY (*cont.*), (*index*, p 104)

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DEBTS PROVABLE IN BANKRUPTCY (cont.) (index p 104)

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DEBTS PROVABLE IN BANKRUPTCY (*cont.*), (*index* p 104)

noticed that it is only a debt which is due in equity that can be proved for. In *Ex p Cappe*, *In re Newman*, 1876, 4 Ch D 724, a building contract provided that in case the contract should not in all things be duly performed by the contractors, they should pay to the employer £1,000 as and for liquidated damages. It was held, however, that the £1,000 was in the nature of a penalty, and that proof could only be entered for the actual damage sustained. It is generally considered that liabilities which have an object other than the payment of money, or which can be met by an injunction or a decree for specific performance, are not within the section (see *Hardy v Footehill*, 1888, 13 A C 351).

In that case the Earl of Selborne said (at p 360) "There may be contracts, such for instance as a promise to marry (not broken), or a covenant not to molest, or not to carry on a particular trade within certain limits, etc., which on a fair interpretation of these words ought to be excluded as having a different object from the payment of money in any contingency, although if they were broken a jury might award damages for their breach. I must guard myself against being supposed to lay down any rule applicable to cases of that kind, or to any others in which an injunction or specific performance would be the most proper remedy."

(2) **Miscellaneous debts provable.** The liability for calls in the winding up of a company may apparently be proved for (*Union Mercantile Mutual Marine Association*, 1883, 25 Ch D 415, and see *In re McMahon*, 1900, 1 Ch 173). Interest accruing due after the date of the receiving order may not, as a general rule, be proved for (*Ex p Lubbock*, 1863, 4 De G J & S 516). If there is a surplus after the payment of the other debts, this interest may be proved for.

Damages awarded to a petitioner in a divorce suit are provable although not a good petitioning creditor's debt (*In re O'Gorman*, 1899, 2 Q B 62). A judgment is *prima facie* evidence of a debt, and proof may be made in respect of it, but if there are circumstances casting suspicion on it or the debt, the court may require evidence of the consideration for the debt. It may be asked, "What species of debt could be more deserving of recognition than a judgment debt?" The answer is that by allowing numerous bogus judgments to be signed against him, the debtor

DEBTS PROVABLE IN BANKRUPTCY (*cont*) (*index* p 104)

might effectually defeat his *bona fide* creditors. It will be remembered in this connection, that any judicial proceeding suffered by a bankrupt with a view to giving a creditor a preference may be set aside as fraudulent (B A 1883 s 48 (1)) (See generally as to interest *In re Brown & Hingrove, Ex p Idor* 1891 2 Q B 574)

If the goods of a creditor are in the possession of a bankrupt, and are seized under the reputed ownership clause, the creditor may prove for his loss (see *Reputed Ownership* p 270)

(j) **Contingent Liabilities** If the bankrupt is under covenant or agreement with any person to indemnify him at some future time, which may be quite indefinite, that person may prove in respect of that future liability. So if a man takes an assignment of a lease under a covenant with the lessee to indemnify him from the consequences of the assignment, liability under this covenant is a contingent liability which may be proved for (*Hardy v Fothergill*, 1888, 13 A C 351, but see *In re New Oriental Bank Corporation* 1895, 1 Ch 753). A surety having a right to prove and share in the distribution of the bankrupt's estate in respect of his contingent liability is a creditor (*In re Paine, Ex p Read*, 1897, 1 Q B 122, but see *In re Warren, Ex p O R*, 1900, 2 Q B 138)

(k) **Who may prove** As a general rule the person proving must be the person to whom the debtor owes the money (*Malcolm v Fullarton*, 1788, 2 T R 645). An executor or administrator may prove for the debts due to the estate of his testator. "A surety in a bond may compel the principal creditor to go in and prove the bond under the commission, and if the surety pays the whole, the creditor will be a trustee of the dividends for him" (per Lord Eldon in *Ex p Rushforth* 1805, 10 Ves at p 414)

A surety may prove for his contingent liability to pay (*In re Paine Ex p Read* (*supra*)) but a surety cannot generally receive anything until the creditors have been paid twenty shillings in the pound. The liability of a co-surety to contribution though unascertained at the time of the bankruptcy is also provable (*Holmshausen v Gullick*, 1893 2 Ch 514) (As to secured creditors, see *Secured Creditor*)

(l) **Holders, etc., of bills of exchange** The holder of a bill of

DECEASED INSOLVENT DEBTOR (*cont*) (*index* p 110)

(a) *Administration in bankruptcy of estate of person dying insolvent*
Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor had he been alive may present to the court a petition in the prescribed form, praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy (B A 1883 s 125 (1)). The court may grant or refuse the petition, as in the case of a living debtor (*In re Outram Ex p Ashworth* 1893, 10 Mor 288). The term "creditor" appears to include several creditors whose debts amount to £50.

(b) *Form of creditor's petition for administration of estate of deceased debtor under sec 125* (No 11)

(Title)

I C D, of [or we C D, of , and E F of
[hereby petition the Court that an order be made for the
administration in bankruptcy of the estate of the late [here insert name and
description of deceased debtor] who died on the day of
188 and 18 —

1 That the said A B for the greater part of the six months next
preceding his decease resided [or carried on business] at
within the district of this Court [or, as the case may be, following the terms of
section 95]

2 That the estate of the said A B is justly and truly indebted to me
[or us in the aggregate] in the sum of £ [set out amount
of act or debts and the consideration]

3 That [I] do not nor does any person on [my] behalf hold any security
on the said deceased debtor's estate, or on any part thereof etc [or, as in
Form No 10, *Creditor's Petition*]

4 That A B within three months next before the said date of his decease
committed the following act [or acts] of bankruptcy, namely [here set out
the nature and date or dates of the act or acts of bankruptcy relied on]

Or

That the will of the said A B [or, as the case may be] was on the
day of 188 proved by J S of ,
and G H of , who consent to this petition

Or,

That letters of administration [or, as the case may be] were on the
day of 188 granted to J S of
, and G H of and that the estate of the
said A B is [according to my information and belief] insufficient to pay his
debts

Dated this day of

188
(Signed) C D
E F

Signed by the petitioner in

my presence

Signed at of 1885

Witness

Description

DECEASED INSOLVENT DEBTOR (*cont.*) (*under* p 110)*(Indorsement)*

This petition having been presented to the Court on the
 day of _____ 188__ it is ordered that this petition shall be
 heard at _____ on the _____ day of _____
 188__ at _____ o'clock in the _____ noon

If you the said J S or G H intend to dispute the matter of any of the
 statements contained in the petition you must file with the Registrar of this
 Court a notice showing the grounds upon which you intend to dispute the
 same

(c) *Service of petition etc* The petition should be served on
 each executor who has proved the will or on any person who has
 taken out letters of administration. If an order is made the
 executor etc must account to the official receiver (see generally,
 Rs 274-279A)

(2) *Order for administration* Upon the prescribed notice being
 given to the legal personal representative of the deceased debtor
 the court may upon proof of the petitioner's debt unless it is
 satisfied that there is a reasonable probability that the estate will
 be sufficient for the payment of the debts owing by the deceased
 make an order for the administration of the estate in bankruptcy
 or may upon cause shown dismiss such petition with or without
 costs (s 125 (2)). Grant of probate is not necessary before the
 petition is served but it must be granted before the order is made
(In re Sleaf 1894 2 Q B 797) As to executor's right of retainer
 see *In re Williams Ex p. Lewis & Evans 1891 8 Mo 65*

(3) [*Repealed by the B A, 1890*]

(4) *Petition where administration action is pending.* A petition
 for administration under this section cannot be presented to the
 court after proceedings have been commenced in any court of
 justice for the administration of the deceased debtor's estate, but
 that court may on proof that the estate is insufficient to pay its
 debts transfer the proceedings to the court exercising jurisdiction
 in bankruptcy and thereupon such last-mentioned court may
 in the prescribed manner make an order for the administration
 of the estate of the deceased debtor and the like consequences
 shall ensue as under an administration order made on the petition
 of a creditor (B A 1883 s 125 (4) as amended by B A. 1890
 s 21 (2)). The transfer may be made without any application
 by a creditor if the court is satisfied that the estate is insolvent.
 The scheme of the whole section is to make administration of the

DECEASED INSOLVENT DEBTOR (*cont.*). (*index* p 110)

estate of an insolvent deceased person equivalent as far as possible, to the administration of the estate of a bankrupt, and the legislature intends that a transfer should take place unless there was something against it (see *In re Kimward*, 1906 W N 16)

(5) **Vesting of property in official receiver** : Upon an order for administration, the property of the debtor vests in the official receiver as trustee thereof and he must forthwith proceed to realise and distribute the same in accordance with the provisions of the Act (s 125 (5))

(6) **Bankruptcy law to apply to** With certain modifications, all the provisions of Part III of the B A , 1883, relating to the administration of the property of a bankrupt, apply, so far as the same are applicable to the case of an administration order in like manner as to an order of adjudication under the Act. The chief modifications are that the official receiver or trustee has no power to examine witnesses under s 27 of the Act (see p 142) (*In re Hewitt*, 1885, 15 Q B D 159), and that neither s 47, which deals with voluntary settlements (*In re Gould*, 1887, 19 Q B D 92), nor s 45, which restricts the rights of execution creditors, is applicable (*Hasluck v Clark* 1899, 1 Q B , 699). Creditors have power as to appointing trustees and committees of inspection (B A , 1890, s 21 (3)). The doctrine of "Mutual credit" is recognised in settling up the estate of a deceased insolvent (*Watkins v Lindsay*, 1898 67 L J Q B 362 (See *Mutual credit and set off*)

(7) **Funeral and testamentary expenses** In the administration of the property of the deceased debtor under an order of administration, the proper funeral and testamentary expenses are payable in full out of the debtor's estate, in priority to all other debts (s 125 ss (7))

(8) **Disposal of surplus** If on administration any surplus remains in the hands of the official receiver, after payment in full of all the debts due from the debtor, together with the costs of the administration and interest as provided in case of bankruptcy, such surplus is paid over to the legal personal representative of the deceased debtor's estate or dealt with in such other manner as may be prescribed (ib ss (8)) As to proof for interest see Sched 2 i 20, and B A 1890 s 23

DECEASED INSOLVENT DEBTOR (*cont.*), (*index*, p 110)

(9) Notice of petition equivalent to notice of act of bankruptcy : Notice to the legal personal representative of a deceased debtor of the presentation of a petition is equivalent to notice of an act of bankruptcy. After such notice no payment or transfer by the legal personal representative operates as a discharge as between him and the official receiver, but subject to this, nothing in the section invalidates any payment, etc., made in good faith by the legal personal representative before the administration order (s 125, s s (9))

(10) Meaning of "court" and "creditor". "Court" means the court within the jurisdiction of which the debtor resided or carried on business for the greater part of the six months immediately prior to his decease, "creditor" means one or more creditors qualified to present a bankruptcy petition (s s (10))

DECLARATION OF TRUST.

A declaration of trust without transfer may be a bill of sale. See *Bills of Sale*, p 53

DEED OF ARRANGEMENT.

- (i) *Definitions Deed of arrangement, Deed of composition, Deed of assignment*
- (ii) *Object of deed of arrangement*
- (iii) *Preliminary steps in making deed of arrangement*, p 116.
- (iv) *The meeting of creditors*
- (v) *Form of the deed*
- (vi) *Registration*, p 118
- (vii) *Duties and liabilities of trustee*
- (viii) *Avoidance of a deed of arrangement*, p 119
- (ix) *Who may impeach a deed*, p 120
- (x) *Result of avoidance of a deed*
- (xi) *Position of trustee when deed avoided by bankruptcy*
- (xii) *Deeds of arrangement rules*, p 121

(i) *Definitions · Deed of arrangement* A deed of arrangement includes any of the following instruments, whether under seal or not, made by or in respect of the affairs of a debtor for the benefit of his creditors generally (otherwise than in pursuance of the law for the time being in force relating to bankruptcy), that is to say (a) An

DEED OF ARRANGEMENT (*cont'd* (*index* p 114))

assignment of property — (b) A deed of or agreement for a composition — and in cases where creditors of a debtor obtain any control over his property or business — (c) A deed of inspectorship entered into for the purpose of carrying on or winding up a business — (d) A letter of licence authorising the debtor or any other person to manage carry on realise or dispose of a business, with a view to the payment of debts — and (e) Any agreement entered into for the purpose of carrying on or winding up the debtor's business, or authorising the debtor or any other person to manage carry on, realise, or dispose of the debtor's business, with a view to the payment of his debts. (Deeds of Arrangement Act, 1887, s 4 (2))

Deed of Composition A deed of composition is an arrangement whereby creditors agree to release and discharge a debtor from the claims they have against him in consideration of receiving a certain composition thereon payable at a stated time or in stated instalments in money or bills with or without a surety, or sureties, the creditors further covenanting not to sue the debtor unless and until he make default in the terms or one of the terms of the arrangement

Deed of Assignment A deed of assignment may be said to be a deed by which a debtor assigns his property real and personal land houses furniture stock-in-trade, book debts etc, to a trustee in trust to realise the same and after payment of the expenses to distribute the balance *pari passu* amongst the assenting creditors who in consideration of (1) the assignment and (2) the dividends received (if any) mutually forbear in respect of and release the debtor (either absolutely or subject to conditions) from the debts respectively owing to them

(ii) *Object of deed of arrangement* The object of the kind of deed of arrangement which it is proposed to discuss in this work is to enable a debtor, by compounding with his creditors to avoid bankruptcy proceedings in any shape or form. Assume, for a moment that a bankrupt has got a judgment against him. The judgment creditor might issue execution and sell him up — but if he assigns all his property to a trustee for the benefit of his creditors generally he may avoid having an execution. It should be observed, however, that an execution will not be avoided by a deed of arrangement unless it is an irrevocable instrument. One of the advantages

DEED OF ARRANGEMENT (*cont.*), (*index*, p 114)

of a deed of arrangement is the total absence of official interference in the administration of the estate and the conduct of the bankrupt's business

A creditor who is party to a deed of arrangement cannot rely on that deed as an act of bankruptcy (see *Acts of Bankruptcy*, p 11)

(iii) Preliminary steps in making deed of arrangement If a debtor is willing to make an assignment, his first step is to call his creditors together In doing this, of course, the debtor can hardly avoid committing an act of bankruptcy within s 4 (1) (h) of the Bankruptcy Act, 1883 (see sub tit *Acts of Bankruptcy*). Inasmuch as the assignment itself is an act of bankruptcy, this will not be a matter of great importance A notice of suspension need not be a formal statement, it may be oral or in writing, but it must be intended to apply to all the creditors

(iv) The meeting of creditors. If an accountant is to act as trustee under the deed, the meeting of creditors may be conveniently held at his office The following points should be borne in mind by the accountant (a) The creditors must be treated equally, that is to say, no creditor must get any secret advantage over his fellows If one creditor gets any secret advantage, whether from the debtor himself, or from some third person with the knowledge of the debtor, the deed becomes voidable by every creditor who has executed it (b) A full disclosure should be made of the debtor's affairs (c) The amount of the assets should not, on any account, be overstated If the assets are misrepresented, the assenting creditors are not bound So where an accountant stated that the books of the debtor showed that the creditors would get twenty shillings in the pound, whereas in fact there was only enough to pay eight shillings, a creditor was not held bound by the deed (*In re Tannenbergs*, 1889, 6 Mor 49) (d) He must obtain the special assent of the creditors to a clause in the deed enabling him to settle the claims of dissentient creditors (see *par* V (f) *infra*)

(v) Form of the deed —

(a) *Parties* The debtor, one or more trustees, and the creditors are made parties It should be for the creditors generally, otherwise it may be a bill of sale, and voidable unless registered as a bill of sale (see *Bills of Sale Act*, 1878, s 4, sub tit *Bills of Sale*)

DEED OF ARRANGEMENT (*cont*), (*index*, p 114)

Thus a deed of assignment to certain creditors (naming them) would be a bill of sale. The best plan is to express the deed as being "for the benefit of such creditors as shall elect to execute the same." That form has been judicially approved (*Paine v Matthews*, 1885, 53 L T 872). Sometimes a clause is inserted specifying the time within which the creditors must come in, if they intend to come in at all, but such a clause should not be put in except under legal advice (see *Hadley v Beedom*, 1895, 1 Q B 646). The ideal plan is to have all the creditors parties.

(b) *Verification of creditor's claim* The accountant should be careful to verify the claim of each creditor who signs, for he becomes liable to pay every such creditor unless there has been fraud. The debt, for instance, might be statute barred.

(c) *Operative part of deed* The deed usually assigns all the debtor's property to the trustee, except household articles and wearing apparel. He receives it on trust, it may be to sell, and apply the proceeds in manner provided by the deed. It is well to exclude leasehold property subject to onerous covenants, and shares upon which there is a liability for calls.

(d) *Powers conferred on the trustee* The following powers are usually conferred on the trustee: (1) To realise the estate and apply the proceeds as may be decided upon, (2) To pay the expenses of calling the meeting and preparing the deed, (3) To pay his own remuneration, which may be a fixed sum, a percentage on the assets realised, or the ordinary accountant's charges, (4) To pay all preferential claims as payable under the rules in bankruptcy, (5) To pay to the creditors dividends upon the amount of their debts (in the manner provided by s s 58-63 of the B A, 1883, see sub tit *Dividends*, and (6) To hand over the surplus, if any, to the bankrupt.

(e) *Indemnity of trustee* A clause is sometimes added to indemnify the trustee in case of bankruptcy supervening. Such a clause is the more necessary if he has to begin work at once, or even if he has to distribute the estate within three months of the execution of the deed. The indemnity is given by the creditors in proportion to their liabilities.

(f) *Clause as to dissentient creditors* It is often useful to add a clause to enable the trustee to settle with dissentient creditors.

DEED OF ARRANGEMENT (*cont*), (*index*, p 114)

for small amounts, who by combining together could present a petition in bankruptcy and so upset the whole arrangement. Such a clause, however, must have the special assent of the creditors, (*In re Adamson*, 1895, 71 L T 579)

(g) *Clause as to secured creditor* A creditor whose claim is guaranteed by a third party, e g , a surety, should require a clause in the deed of arrangement itself reserving his rights against the surety, or else should obtain the permission of the surety before assenting to a deed of arrangement, for although in bankruptcy a surety is not discharged, this does not apply to a private arrangement, which is an act of the parties themselves. Were a creditor to assent without such a clause, he might release his surety.

(h) *Release of debts* The deed also contains a clause by which all the creditors who take benefits under the deed give the debtor a release of their debts, or enter into a covenant not to sue for those debts.

(vi) *Registration* Every deed of arrangement must be registered within seven days after the first execution thereof by the debtor or any creditor, otherwise it is void (D of A Act, 1887, s 5). A copy of the deed, and every schedule thereto annexed, must be filed, together with an affidavit verifying the time of execution, the place of business of the debtor, the total amount of property and liabilities included under the deed, the amount of the composition payable, and the names and addresses of his creditors (*ib*, s 6 (1)). A deed will not be registered unless it is stamped (*ib* (2)). Creditors may, however, execute the deed subsequent to registration. The register (which is kept in accordance with s 7) may be inspected at any time, and extracts may be made therefrom on payment of the proper fees (*ib* s 12).

(vii) *Duties and liabilities of trustee under a deed* In some trades it is customary to make the accountant who represents the largest creditor trustee under the deed.

(a) *Generally* The trustee must carry out the trusts of the deed. If he honestly exercises his discretion he incurs no responsibility, but it is always open to him to consult the committee of inspection, if there is one, or to call a meeting of the creditors. If he has to bring an action he has a charge on the estate for the costs, but if the estate is small he should get an indemnity from the creditors.

DEED OF ARRANGEMENT (*cont*) (*index*, p 114)

(b) *Collection and distribution of assets* Where debts are owing to the estate, the trustee may collect them, and, by virtue of the Judicature Act, 1875, s 25 (6), may sue for them in his own name. It has been decided, however, that until a deed of assignment has ceased to be available as an act of bankruptcy (i.e., until after it has been executed for three months) the trustee cannot give a debtor to the estate a valid discharge (*Davis v Petrie*, 1905, 2 K B. 528). Thus a debtor who has paid the trustee under the deed might have to pay the trustee in bankruptcy also. It follows from this that the trustee must walk warily for the first three months if there are any dissentient creditors who are in a position to upset the deed. Where however, there are no dissentient creditors, or there is an indemnity clause in the deed, his position is secure. In any event, however, a trustee is well advised to keep a certain amount of money in hand to meet any unexpected liabilities that may crop up.

(c) *Liability to account* As he is in the position of an ordinary trustee the trustee under a deed must account for all moneys received by him and must give information to any creditor as to all moneys received and paid away by him (*Ex p White*, 1866 13 L T 24). He may even have to account after he has been removed from the office of trustee (*In re Rogers* 1887 4 Mor 67). He must also account to the Board of Trade under s 25 of the B A, 1890.

(vii) Avoidance of deed of arrangement —

(a) *Under the Statute of Elizabeth* If an assignment is not really for the benefit of creditors, but to enable the debtor to retain some property for his own benefit, it may be avoided at any time as a fraud. But an assignment made in good faith for the benefit of creditors is not void because it happens to benefit the debtor (*Maskelyne & Cooke v Smith* 1903, 1 K B 671).

(a) *Under the law of bankruptcy* A deed may be avoided if it is an assignment of all the bankrupt's property for the benefit of some creditors to the exclusion of others (B A, 1883, s 4 (1) (b)) or an assignment for the benefit of creditors generally (ib s s 4 (1) (a)). It may also be avoided as an assignment of part of the debtor's property where it amounts to a fraudulent preference. A deed drawn on the lines above indicated (*vide supra* *Form of*

DEED OF ARRANGEMENT (*cont*), (*index*, p 114)

Deed) would be an act of bankruptcy, but if all the creditors are in under it, there would be no one to impeach it. Again, a deed of assignment can only be impeached under the bankruptcy acts, within three months of its execution (see *In re Poppleton*, 1896, 74 L T 582)

A deed will not necessarily be void because it contains provisions in favour of the debtor, or because a particular creditor is intentionally excluded from it. As to its being set aside as a fraud upon creditors, see *Voluntary Settlement*

(ix) Who may impeach a deed. A dissentient creditor, whose debt exceeds £50, can present a petition at any time within three months of a deed, or two or more small creditors can combine together for this purpose. But a creditor who has assented to the deed, has acquiesced in, or taken benefits under it, cannot present a petition founded on the deed as an act of bankruptcy, nor can he rely for this purpose on the circular sent out to convene the meeting (*Ex p Viney*, 1895, 2 Mans 153). Note that a creditor need not have executed the deed, it is sufficient that he acquiesced in it. His attendance at the meeting at which the deed was agreed is not of itself sufficient evidence of acquiescence (see *In re Carr*, 1902, 85 L T 522)

(x) Result of avoidance of deed. Where, after the execution of a deed of assignment, the debtor is adjudicated bankrupt, all creditors may prove for their debts, even though they have been released by the deed. By the doctrine of relation back (see sub tit *Relation Back*) the trustee in bankruptcy becomes entitled to all the property the debtor was possessed of at the date of the act of bankruptcy on which the receiving order was made.

(xi) Position of the trustee when deed avoided by bankruptcy. The trustee under a deed of assignment is in no better position than any person to whom the bankrupt makes over his property. The official receiver, who becomes entitled to the debtor's property when the receiving order is made, must decide whether he will treat the trustee under the deed as a trespasser or as his agent. If he treats him as a trespasser (which, in practice, he only does where there has been misconduct), the trustee must hand over all property unconverted, and account for and pay the value of all

DEED OF ARRANGEMENT (*cont*), (*index*, p 114)

that which has been converted It is then that his indemnity from the creditors will come in useful Where the official receiver treats him as his agent, the trustee must render accounts, including accounts of the debtor's business if he has carried it on (*In re Riddeough*, 1884, 14 Q B D 25) The trustee may not retain his remuneration, or any sum to cover costs and expenses, as he incurred these with knowledge of an act of bankruptcy Nor can he retain costs which he has incurred in employing solicitors to draw up the deed of arrangement (see *In re Richards*, 1884, 1 Mor 242, *In re Foster*, *ib* 292, *In re Hobbins*, 1899, 6 Mans 212) Where, however, he has incurred expenses which have resulted in a benefit to the estate, he will be allowed to retain them The rule on this point has been thus enunciated "If the trustee in bankruptcy, in the exercise of his discretion, thinks that the creditors have derived profit from the work which has been done at the direction of the debtor, the trustee may adopt these services, and pay for them

Generally speaking, a trustee ought to decline to adopt the services of the solicitor or accountant with regard to the meetings which debtors, in the expectation of a probable bankruptcy, call of their creditors, but I am unwilling to say that there may not be a case in which the trustee may properly adopt a portion of the services

He must exercise his own discretion, and when he has done so, then, if anyone feels aggrieved thereby, the matter may be brought before the court But the rule that I lay down, and intend that the trustee should act upon, is that he should be very strict in this matter of adopting services of this sort and paying for them, and he must go through the items of the bill of costs, and only pay for such items as he is clearly satisfied have been incurred in such a way as that a benefit to the extent of the charge has resulted to the creditors (*In re Simonson*, 1894, 1 Q B at p 437, per Vaughan Williams, J, see also *In re Foster*, 1895, 72 L T 364)

(xii) Deed of arrangement rules The deed of arrangement rules of 1887, 1888, and 1891, make provision for the registration of deeds Of those issued in 1887, Rs 3-6 provide for the transmission of copies to county courts, and 11-12 for searches and extracts The rules of 1888 provide a form of schedule of creditors to be attached to the affidavit accompanying the deed The rules of 1890 provide (Rs 3-6) for returns of registered deeds, while

DISCHARGE OF BANKRUPT (*cont.*), (*index*, p 122)

Constable, 1890, 25 Q B D 285) The court may then either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property

(iii) Application where bankrupt guilty of misdemeanour, etc The court must, however, refuse the discharge if the bankrupt has committed any misdemeanour under the Debtors Act, 1869, or the B A, 1883, or any other misdemeanour connected with his bankruptcy, or any felony connected with his bankruptcy, unless for special reasons the court otherwise determines The words "has committed any misdemeanour" appear to mean "indicted and convicted" Felonies or misdemeanours "connected with the bankruptcy" "include only such as would be *ejusdem generis* with the misdemeanours dealt with by the Acts" (*In re Hedley*, *Ex p B T*, 1895, 1 Q B 925, per Vaughan Williams, L J) They do not include a charge of embezzlement The fact that the court passed only a nominal sentence might be regarded as a "special reason" for granting the discharge, but the court would probably require a period of probation (*Solomons*, *In re*, 1904, 2 K B 760)

(iv) Powers and duties of court as to discharge on proof of certain facts On proof of any of the facts hereinafter mentioned the court must either —

(1) *Refusal* Refuse the discharge, or

(2) *Suspension for certain period* Suspend the discharge for a period of not less than two years, or

(3) *Suspension until 10s in £ paid* Suspend the discharge until a dividend of not less than 10s in the £ has been paid to the creditors, or

(4) *Requiring bankrupt to consent to judgment* Require the bankrupt, as a condition of his discharge, to consent to judgment being entered against him by the official receiver or trustee for any balance, or part of any balance, of the debts provable under the bankruptcy which is not satisfied at the date of the discharge, such balance to be paid out of the future earnings or after-acquired property as the court may direct Execution on such a judgment may not issue without the leave of the court, which may be given

DISCHARGE OF BANKRUPT (*cont*), (*index*, p 122)

on proof that the bankrupt has since his discharge acquired property etc, available for payment of his debts (B A, 1883, s 8 (2))

- *Form of consent of bankrupt to judgment being entered for balance or part of balance of provable debts* (No 64)

Re

I, A B, of _____, the above-named bankrupt, do hereby consent to judgment being entered against me in the King's Bench Division of his Majesty's High Court of Justice [*or as the case may be*] by the official receiver [*or trustee*] for the sum of £ _____, being the balance, or part of the balance, of the debts provable under my bankruptcy which is not satisfied at the date of my discharge, but this consent is subject to the provision contained in the Bankruptcy Act, 1890, with regard to the issue of execution on such judgment

Dated this _____

day of _____

189
(Signed) A B

Form of affidavit by bankrupt, whose discharge has been granted conditionally as to after-acquired property or income (No 65b)

(*Title*)

I, _____ the above-named debtor, make oath and say as follows —

1 I have since the date of my discharge resided and carried on business at _____, and I now reside and carry on business at _____

2 The statement hereto annexed is a full, true, and complete account of all moneys earned by me, and of all property and income acquired as received by me since the date of my discharge [*or, since the date when last I filed a statement of after-acquired property and income in Court, namely, the* _____ day of _____ 189 _____]

Sworn at, etc _____

(*Signature of Debtor*)

Variation of order All this is subject to the proviso that if at any time after the expiration of two years from the date of any order so made, the bankrupt can satisfy the court that there is no reasonable probability of his being able to comply, the court may modify the order (B A 1890, s 8 (2)) The court may consider any conduct of the debtor which might have had some effect on his bankruptcy, although no specified offences proved (see s s (2) *supra*, and *In re Barker, Ex p Constable, re Jones*, 1890, 25 Q B D 285) Suspension for as much as five years will not be imposed except in bad cases (*In re Sawbey*, 1897, 76 L T 534) An order for 10s in the £ to some and not to all creditors cannot be made (*In re Carne, Ex p Jackson*, 1889, 6 Mor 55) A judgment can only be satisfied out of future property, and should not be entered up if there is not much chance of its being fruitful (*In re Gaskell*, 1904, 2 K B 478) The order may provide for the judgment being

DISCHARGE OF BANKRUPT (*cont.*), (*index*, p 122)

satisfied by instalments In that case, failure to pay an instalment may, on proof that the bankrupt had after-acquired property, lead to the revocation of the discharge (*In re Summers*, 1907, 23 T L R 465) It may be observed that a scheme of arrangement cannot provide for judgment being entered up by the trustee in this manner (*In re Aylmer, Ex p Bischoffsheim* (1887, 20 Q B D 258) In one case the court suspended a discharge for two years, where the bankrupt, after setting aside £500 a year for himself, undertook to pay the balance to the trustee until the creditors received 10s in the £ (*In re Dallmeyer*, 1906, 22 T L R 445)

(v) Facts which may prevent discharge The court may (by virtue of s 8 (3)) exercise the powers above referred to on proof of any of the following facts —

(a) *Assets not equal to 10s in £* That the assets are not equal to 10s in the £ on the bankrupt's unsecured liabilities, unless he satisfies the court of the fact that this state of things has arisen from circumstances for which he cannot justly be held responsible

Assets 10s in the £ Assets are deemed to be equal to 10s in the £ when the court is satisfied that the property of the bankrupt has realised or is likely to realise, or with due care in realisation might have realised, an amount equal to 10s in the £ on his unsecured liabilities, and a report by the official receiver or the trustee shall be *prima facie* evidence of the amount of such liabilities (B A , 1883, s 30 (4))

(b) *Omission to keep books* That he has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years preceding his bankruptcy

The books should not require skilled investigation, but should show at once the state of the debtor's business (*Ex p Reed and Bourn*, 1886, 17 Q B D 244) A solicitor who entered a trade was held bound to keep proper trade books (*Ex p Carter*, 1850, 1 Fonb 83)

(c) *Trading after insolvency* That he has continued to trade after knowing himself to be insolvent "A man has a perfect right, as long as he is solvent, to determine that he will go on with a business, although it may be a losing business But the moment he becomes insolvent, then he is no longer going on at his

DISCHARGE OF BANKRUPT (*cont*), (*index*, p 122)

own risk in case of failure, he is going on at the risk of his creditors, in case things do not mend as he hopes they will. In my judgment, a man has no right to do that" (*In re Stanton*, *Ex p B T*, 1887, 19 Q B D 182, 4 Mor 242, 251, per Cave, J). A debtor does not trade after knowing himself to be insolvent who believes that a careful and prudent realisation of assets will produce 20s in the £, although he may know that a forced sale at breaking up prices will not produce that result (*In re John Brown & Co*, 1906, 22 T L R 291)

(d) *Wrongful contraction of debts* That he has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it. Where a debtor obtains *goods*, even though he is insolvent at the time (*Ex p Bayley*, 1867, L R 3 Ch 26, 244), or where he has capital not immediately realisable, he is not within this clause (*In re Sharp*, 1893, 10 Mor 114)

(e) *Loss of assets* That he has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his liabilities

(f) *Hazardous speculations* That he has brought on, or contributed to, his bankruptcy by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs

"A man is not bound to keep up appearances but to pay his debts, and if his profits will not allow of his living at the particular rate he has been accustomed to live at, then his plain duty is to reduce his scale of living, and not to go on living out of the money of his creditors" (*In re Stanton*, *Ex p B T*, 1887, 19 Q B D 182). A creditor who relies on speculations as rash and hazardous must specify them, so that the court may judge (*In re John Brown & Co.*, *ubi supra*)

(g) *Vexatious actions* That he has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him (see *Ex p Blackhurst*, 1858, 3 De G and J 39)

(h) *Unjustifiable expense* That he has within three months

DISCHARGE OF BANKRUPT (*cont*) (*index*, p 122)

preceding the date of the receiving order incurred unjustifiable expense by bringing a frivolous or vexatious action

(i) *Undue preference* That he has within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors. An undue preference may be shown to a creditor who would have been entitled to preferential payment under the bankruptcy (*In re Bryant*, 1895 1 Q B 420, see *Fraudulent Preference*, p 177)

(j) *Fraudulently incurring liabilities* That he has within three months preceding the date of the receiving order incurred liabilities with a view of making his assets equal to ten shillings in the pound on the amount of his unsecured liabilities

(k) *Prior bankruptcy, etc* That he has on any previous occasion been adjudged bankrupt, or made a composition or arrangement with his creditors

(l) *Fraud* That he has been guilty of any fraud or fraudulent breach of trust.

(vi) *Discharge where bankrupt has made a fraudulent settlement.* A discharge may be refused, suspended, or granted conditionally where the debtor has made an ante-nuptial settlement which the court thinks was made in order to defeat or delay creditors, or was unjustifiable, having regard to the state of his affairs when it was made (B. A 1883, s 29)

(vii) *Effect of order of discharge.* An order of discharge shall not release the bankrupt from any debt on a recognisance nor from any debt with which the bankrupt may be chargeable at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence. and he shall not be discharged from such excepted debts unless the Treasury certify in writing their consent to his being discharged therefrom.

An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party nor from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party (B A, 1883, s. 30 (1))

DISCHARGE OF BANKRUPT (*cont*), (*index*, p 122)

An order of discharge, however, releases the bankrupt from all other debts provable in bankruptcy (*ib* (2)), and is conclusive evidence of the bankruptcy, and of the validity of the proceedings therein, and in any proceedings instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by the order, the bankrupt may plead that the cause of action occurred before his discharge, and may give the B A, 1883, and the special matter in evidence

Debts incurred by fraud, in so far as they are the subject of actions of tort, are not provable, and are not therefore affected by orders of discharge. An action founded on such a fraud may be brought before discharge, but judgment cannot be enforced until after that time (*Cobham v Dalton*, 1875, L R 10 Ch 655). As to fraudulent breaches of trust, see *Orrett v Corser*, 1855, 21 Beav 52, *In re Green*, *Napper v Fanshawe*, 1895, 2 Ch 217

(viii) Effect of order on partners and joint debtors. An order of discharge shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him (B A, 1883, s 30 (4))

(ix) Release of provable debts. Inasmuch as the order releases the bankrupt from all provable debts, it follows that a creditor who does not take the trouble to prove loses his remedy. The discharge releases all English debts in any part of the world (*Aliman v Castrique*, 1844, 13 M & W 443), while a discharge under an old Irish Act was held to be a bar, as well of those debts due from the bankrupt in England or Scotland as to those in Ireland (see *Ferguson v Spencer*, 1840, 2 Sc N R 229). Where a man charges his after-acquired property to secure an advance which might form the subject of a proof in his bankruptcy, and he obtains his discharge, it seems that, the debt having gone, the security falls with it (*Thompson v Cohen*, 1872, L R, 7 Q B 527, 533). It follows from that case that it would be unsafe for a man who had a charge over after-acquired property to ignore the bankruptcy of his debtor.

A promise by a bankrupt who has obtained his discharge to pay a debt from which his discharge has released him, is a mere *nudum*

DISCHARGE OF BANKRUPT (*cont*), (*index*, p 122)

pactum, and will not support an action (*Heather v Webb*, 1876, 2 C P D 1), otherwise if there is new and valuable consideration (*Jakeman v Cook*, 1878, 4 Ex D 26) An order under s 53 for appropriation of pay or salary is put an end to by an order of discharge, unless expressly continued (see *post*, p 261) The discharge does not exempt the debtor from being proceeded against for any criminal offence (B A 1883, s 167), nor does it release him from a money penalty for some offence of a criminal nature (*Bancroft v Mitchell*, 1867, L R 2 Q B 549) An order of discharge binds the Crown (B A, 1883, s 150)

(x) Effect of discharge on damages for seduction, judgments against co-respondents, and affiliation orders An order of discharge shall not release a bankrupt from any liability under a judgment against him in an action for seduction, or under an affiliation order, or as a co-respondent in a matrimonial cause, except to such an extent and under such conditions as the court may order (B A 1890, s 10) The onus is on the bankrupt to prove that there is a special reason *In re Schumacher* (1907), 23 T L R 336 (see also *In re Palmer*, 1905, 21 T L R 344)

(xi) Appeals from order made on application for discharge An unpaid creditor may appeal against the grant of an order of discharge (*Ex p Casile Mail Packets Co*, *In re Payne*, 1886, 18 Q B D 154), while the Board of Trade may appeal from any order made on an application for discharge (*In re Stanlon*, *Ex p B T*, 1887, 19 Q B D 182)

(xii) Duty of discharged bankrupt A discharged bankrupt must, notwithstanding his discharge, give such assistance as the trustee may require in the realisation and distribution of the property vested in the trustee, and if he fails to do so he shall be guilty of a contempt of court, and the court may also, if it thinks fit, revoke his discharge, but without prejudice to the validity of any sale, disposition, or payment duly made or thing duly done subsequent to the discharge but before its revocation (B A, 1890, s 8 (8))

The duty of the bankrupt to aid in the realisation of his property continues after discharge (see *Duty of Debtor*, p 155) As to the effect of an order of discharge on a landlord's remedies, see *Landlord and Tenant*, p 187, and as to the effect of discharge on criminal responsibility, see *Fraudulent Debtors*, p 174

DISCHARGED BANKRUPT.

As to the duty of a discharged bankrupt, see *Discharge of Bankrupt*, p 130

***DISCLAIMER OF ONEROUS PROPERTY.**

- (1) *Disclaimer generally*
- (2) *Operation of disclaimer, p. 132, et seq* (a) *Where the bankrupt is lessee*, (b) *Where there is a sub-lessee*, (c) *Where the bankrupt is assignee of a lease*, (d) *Freehold property and shares*
- (3) *Discretion of the court as to disclaimer, p 134, et seq* (i) *Disclaimer without leave*, (ii) *Disclaimer with leave*
- (4) *Loss of the right to disclaim, p 135*
- (5) *Rescission of bankrupt's contracts, p 136*
- (6) *Vesting orders, p. 136* (a) *Generally*, (b) *Vesting of leasehold property.*
- (7) *Rights of persons injured by disclaimer, p 138*
- (8) *Forms relating to disclaimer, p 138*

(1) **Disclaimer generally** Amongst the matters which the trustee has to consider on his appointment, none is more important than the question whether he will disclaim some, and what part, of the bankrupt's property on the ground that it is burdened with onerous covenants, and is likely to be an incumbrance to the estate. Thus, suppose that part of the bankrupt's property consisted of a building contract, the fulfilment of which must involve the purchase of materials at great expense, it might be prudent for the trustee, in the interest of the creditors, to disclaim the contract and abandon the prospective profits, and leave the building owner to prove in the bankruptcy for the loss sustained.

Intention of the legislature "The intention of the legislature in cases of disclaimer by a trustee in bankruptcy clearly appears to have been, while they were providing for the relief of the trustee from liability in respect of onerous obligations of the bankrupt, including the obligations arising under a lease, to do so with as little disturbance as might be of the rights and liabilities of third persons by reason of the disclaimer." Per Vaughan Williams, L J, in *In re Carter Ellys, Ex p Savill*, 1905, 1 K B 735

Text of B A, 1883, s 55 By s s (1) of this section, "Where

DISCLAIMER OF ONEROUS PROPERTY (*cont*), (*infra*, p 131)
 any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property, that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within twelve months after the first appointment of a trustee, disclaim the property

“Provided that where any such property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within twelve months after he first became aware thereof ”

The period of twelve months, which is fixed by the B A , 1890, s 13, may be extended by the court It runs from the date of the certificate of the appointment of the trustee (*In re Cohen*, 1905, 2 K B 704) It is important to observe that the property which may be disclaimed is not necessarily property divisible amongst the creditors, the trustee may disclaim any onerous property belonging to the bankrupt (see *In re Maughan, Ex p Monkhouse*, 1885, 14 Q B D 956) The disclaimer must be in writing signed by the trustee It has been held that a written disclaimer signed by the trustee's solicitor is invalid (*Wilson v Wallam*, 1880, 5 E D 155) The disclaimer must also be filed, and is inoperative until it has been filed (B R 320 (4))

(2) **Operation of disclaimer** Sub-sec (2) of s 55 provides “The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person ” The effect of this provision has been thus summarised —

DISCLAIMER OF ONEROUS PROPERTY (*cont.*), (*index*, p 131)

"As regards the bankrupt and his property, the disclaimer determines his rights, interests, and liabilities in the property disclaimed as from the date of the disclaimer. As regards the trustee personally, his liability is determined by the disclaimer as from the date when the property vested in him. As regards third persons, their rights and liabilities are not affected, except so far as may be needed to release the bankrupt and his property and the trustee from liability" (*Williams*, p 272). It is to be observed that in the case of a lease, the bankrupt's estate remains liable for rent and covenants down to the date of the disclaimer. Consequently the landlord could prove in the bankruptcy on the contract, or for its breach, until disclaimer, and for damages for injury by operation of the disclaimer after that date. See further as to this s s (7) and notes, *post*, p 138.

Effect of decided cases Inasmuch as vexed questions relating to disclaimer often arise in relation to leasehold property, it may be useful to summarise the effect of the cases which have been decided in relation to the disclaimer of leasehold property.

(a) *Where the bankrupt is lessee* In this case the trustee can absolutely free himself from all personal liability, past as well as future, by disclaiming within the twelve months. If he does not disclaim, he becomes personally liable for the rent (*Wilson v Wallau*, 1880, 5 Ex D 155), but he may relieve himself of liability to the landlord without disclaiming, by assigning the lease to a pauper even if he knows him to be a pauper (*Hopkinson v Lovering*, 1883, 11 Q B D 92). In any case, however, he may be indemnified out of the estate (*Lowrey v Barker*, 1880, 5 Ex D 170).

It has been held that, in the case of a lease, the term is put an end to by disclaimer, so that a surety for rent in arrear under the lease is discharged as and from the date of the disclaimer, there, being no rent due from the lessee after that date (*Stacy v Hill*, 1901, 1 Q B 660).

As to disclaimer of a lease in a small bankruptcy, see *Small Bankruptcies*, p 299.

(b) *Where there is a sub-lessee* Where there is a sub-lessee, the landlord cannot eject him on disclaimer by the trustee of the

DISCLAIMER OF ONEROUS PROPERTY (*cont.*), (*index*, p 131).
 lessee (*Smalley v Hardinge*, 1881, 7 Q. B D 524) Nevertheless,
 he may distrain for the rent—and may re-enter for the breach
 of the lessee's covenants (*Ex p Walton, In re Levy*, 1881, 17 Ch
 D 746)

(c) *Where the bankrupt is assignee of a lease* and the lease is
 disclaimed, the rights of landlord and lessee are unaffected by
 the disclaimer, and they are remitted to their original positions
 (*Smyth v North*, 1872, L R 7 Ex 242) Again, the surety for
 a bankrupt assignee has been held liable to pay to the lessee rent
 which the lessee had been compelled to pay by the lessor which had
 accrued due after the disclaimer by the trustee in the bankruptcy
 of the assignee (*Harding v Preece*, 1882, 9 Q B D 281)

(d) *Freehold property and shares* The trustee may disclaim
 freehold property if it is burdened with onerous covenants (*re*
Mercer & Moore, 1880, 14 Ch D 287) He may also disclaim
 shares (see *In re Hallett, Ex p National Insurance Corporation*, 1894,
 1 Mans 380)

(3) **Discretion of the court as to disclaimer** A trustee shall not
 be entitled to disclaim a lease without the leave of the court, except
 in any cases which may be prescribed by general rules, and the
 court may, before or on granting such leave, require such notices
 to be given to persons interested, and impose such terms as a
 condition of granting leave, and make such orders with respect
 to fixtures, tenant's improvements, and other matters arising out
 of the tenancy as the court thinks just (B A , 1883, s 55 (3))

This sub-section may be conveniently dealt with under two heads

(i) *Disclaimer without leave* , (ii) *Disclaimer with leave*

(i) *Disclaimer without leave* R 320 of the Bankruptcy Rules
 should be read in connection with this sub-section It provides
 that leave to disclaim is unnecessary—(a) Where the bankrupt has
 not sub-let any part of the premises or mortgaged or charged the
 lease, and (i) The rent reserved and real value of the property
 leased, as ascertained by the Property Tax Assessment, are less than
 £20 per annum , or (ii) The estate is administered under s 121
 of the B A , 1883 (i e , is the subject of a summary administration) ,
 or (iii) The trustee serves the lessor with notice of his intention
 to disclaim, and the lessor does not, within seven days after the

DISCLAIMER OF ONEROUS PROPERTY (*cont*), (*index*, p 131)
 receipt of such notice, give notice to the trustee requiring the matter to be brought before the court. (b) Where the bankrupt has sub-let the premises, or mortgaged or charged the lease, and the trustee serves the lessor and the sub-lessee or the mortgagees with notice of his intention to disclaim, and none of them, within fourteen days after the receipt of such notice, requires the matter to be brought before the court Except as provided by this rule, the disclaimer of a lease without the leave of the court will be void (B R 320 (3)) Further, in order to be operative, the disclaimer must be filed (*ib* , (4)) In a case where a lease may be disclaimed without leave, the court cannot order compensation to the landlord (*In re Sandwell, Ex p Zerfass*, 1885, 14 Q B D 960)

(11) *Disclaimer with leave* It seems that a parol tenancy, such as a tenancy from year to year, can only be disclaimed by leave (*In re Maughan, Ex p Monkhouse*, 1885, 14 Q B D 956) A lease may be disclaimed, although the term has expired by effluxion of time or by forfeiture (*Ex p Dyke, In re Morrish*, 22 Ch D 410)

Compensation to landlord It will be seen that the court has power to impose terms upon a trustee who seeks to disclaim The question whether the court will decree payment of compensation to the landlord is decided in accordance with a rule enunciated by Cotton, L J , in *Ex p Isherwood, In re Knight*, 1882, 22 Ch D 384, where he said, " In determining what the trustee ought to pay, regard must be had to two things, whether the occupation has either in fact produced a benefit to the bankrupt's estate, or was contemplated as likely to produce a benefit " There is no appeal from the discretion of the judge in giving leave to disclaim, (*Ex p East and West India Dock Co , In re Clarke*, 1881, 17 Ch D 759)

(4) *Loss of right to disclaim* The trustee shall not be entitled to disclaim any property in pursuance of this section in any case where an application in writing has been made to the trustee by *any person interested* in the property requiring him to decide whether he will disclaim or not, and the trustee has for a period of twenty-eight days after the receipt of the application, or such *extended period* as may be allowed by the court, declined or neglected to give notice whether he disclaims the property or not , and, in the case of a contract, if the trustee, after such application as aforesaid,

DISCLAIMER OF ONEROUS PROPERTY (*cont.*), (*index*, p 131)

does not within the said period or extended period disclaim the contract, *he shall be deemed to have adopted it* (*ib.*, s 55 (4))

The court will not extend the period of twenty-eight days, except for good cause shown. Failure to decide within this period may render the trustee personally liable for the payment of rent and costs, if he desire to disclaim (*In re Page, Ex p Mackay*, 1884, 14 Q B D 401)

The effect of the proviso at the end of the above sub-section appears to be to effect a change by which the trustee, as representing the body of creditors, is substituted as the party liable for the trustee as representing the old bankrupt contractor (see *Williams*, p 278)

(5) **Rescission of bankrupt's contracts** The court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy (*ib.*, s s (5))

(6) **Vesting orders**—(a) *Generally* The court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the court thinks just, and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose (*ib.*, s s (6))

(b) *Vesting of leasehold property* Provided always, that where the property disclaimed is of a leasehold nature, the court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise

DISCLAIMER OF ONEROUS PROPERTY (*cont*), (*index*, p 131)
 except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt (s s (6) *ad fin*)

The B A, 1890, s 13, provides that the court may, if it thinks fit, modify the terms prescribed by the foregoing proviso, so as to make the person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order. A mortgagee or sub-lessee from a bankrupt lessee can, as a rule, only obtain a vesting order upon the terms and conditions mentioned in sub-sec (6), and s 13 is only meant for the relief of the undertenant or mortgagee in hard cases (*In re Walker*, 1895, 2 Mans 60). In that case the only term imposed was that the lessor should accept a surrender at any time on the mortgagee giving six months' notice in writing and performing all the covenants and obligations of the lease (see also *In re Carter and Ellis*, 1905, 1 K B 735). The persons most likely to seek for vesting orders are sub-lessees and mortgagees. It is competent for the landlord of a bankrupt lessee to apply for an order vesting the property in the mortgagee, subject to the liabilities of the original lease (*In re Baker, Ex p Lupton*, 1901, 2 K B 628). When a mortgagee does not appear on a debtor's application, the court will exclude him from all interest in and security on the property, unless he shall soon declare his option to take a vesting order (*In re Parker, Ex p Tinquand*, 1884, 14 Q B D 405).

DISCLAIMER OF ONEROUS PROPERTY (cont), (index, p 131)

A person claiming an interest in the property must, on request of the official receiver or trustee, furnish a statement of his interest (B R 320 (7))

(7) **Rights of persons injured by disclaimer** Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy

It is obvious that where the trustee disclaims, the rights of third parties may be prejudiced. Thus, if he disclaims a lease, the landlord may be deprived of his rent. The above sub-section would enable the landlord to prove his loss in the bankruptcy. Where a bankrupt was lessee for a term of years at £500 a year, and the trustee disclaimed, the landlord showed that he was unable to let the premises at so high a rent. It was held that he was entitled to prove in the bankruptcy for the difference between the present value of £500 a year for the remainder of the term, and the present value for the same period of the letting value of the premises. The fact that he may have to admit the landlord to proof is therefore an element which the trustee must take into consideration when deciding whether to disclaim or not. In the case of an under-lessee who by reason of a disclaimer on the part of the trustee of his immediate landlord, became liable to pay the rent reserved by the head-lease, he would be entitled to prove in the bankruptcy for the value of the difference between the two rents (*Ex p Walton, In re Levy*, 1881, 17 Ch D 746). The same principles apply where other property is disclaimed. Thus, if the trustee disclaim shares partly paid up, the company may prove for the whole of the unpaid calls, less any value which may be attached to the shares (*In re Hallett, Ex p National Insurance Corporation*, 1894, 1 Mans 380). Where a contract to take shares is disclaimed, the company can only prove for damages and not for the amount payable on the shares (*In re Hooley, Ex p United Ordnance and Engineering Co, Ltd*, 1899, 2 Q B 579). As to disclaimer of a lease used by partners for partnership purposes, see *Ex p Corbett, In re Shand*, 1880, 14 Ch D 122.

DISCLAIMER OF ONEROUS PROPERTY (*cont*), (*index*, p 131)(8) Forms relating to disclaimer (a) *Notice of intention to disclaim lease* (No 119)

(Title)

Take notice that I intend to disclaim the lease dated whereby [*here specify property let*] was let to the above-named debtor at a rent of £

If you do not within seven days after service of this notice upon you require me by notice in writing to bring the matter before the Court, I hereby disclaim the said lease as from the expiration of the said seven days

Dated

To Mr X Y

G H [Trustee]

(b) *Notice to landlord of intention to disclaim leasehold property not sub-let or mortgaged* (No 199A)

(Title)

Take notice that I intend to disclaim the [*lease or tenancy, as the case may be*] dated whereby [*here specify property let*] was let to the above-named debtor at a rent of £

If you require the matter to be brought before the Court, you must give notice thereof to me in writing within seven days of the receipt by you of this notice

Dated this day of , 189

Trustee

Address

To

The landlord of the above mentioned property

[NOTE — *The schedule to notice when given by lessor should contain the following particulars Date of lease, Names, addresses, and description of parties to lease, Full description of property leased, Term and rent, Date of assignment to bankrupt (if any), Names and addresses of parties to assignment (if any), Particulars of and notices of mortgage of lease by bankrupt*

(c) *Notice of intention to disclaim leasehold property sub-let or mortgaged* (No 119B)

(Title)

Take notice that I intend to disclaim the lease dated whereby [*here insert particulars of demised property*] was let to [*the above-named bankrupt, or as the case may be*] at a rent of £

If you require the matter to be brought before the Court, you must give notice thereof to me in writing within fourteen days of the receipt by you of this notice

Dated this day of , 189

Trustee

Address

To Mr

The landlord of the above-mentioned premises and

To Mr

The mortgagee or sub-tenant

DISCLAIMER OF ONEROUS PROPERTY (*cont*), (*under* p 131)(d) *Disclaimer without notice* (No 120)

(Title)

I, _____, the trustee of the property of the above-named bankrupt, hereby disclaim the [*lease dated the _____ or as the case may be*] of the premises [*insert description of the property*] which were let to the above-named bankrupt [*on a _____ tenancy or for a term of _____ years, or as the case may be*] at a rent of £ _____ per _____

Notice of this disclaimer has been given to [*insert names and addresses of persons to whom notice has been given*]

Dated this _____ day of _____, 189 _____

Trustee

Address _____

(e) *Disclaimer of leasehold property after notice to landlord, mortgagees, etc* (No 120A)

(Title)

Pursuant to notice, dated the _____ day of _____, addressed to [*here insert names and addresses of persons to whom notice of intention to disclaim has been given*] I, _____ the trustee of the property of the above-named bankrupt, hereby disclaim the lease dated the _____ day of _____ 18 _____, whereby [*here insert particulars of demised property*] were let to [*the above-named bankrupt, or as the case may be*] at a rent of £ _____ for a term of _____

Notice of this disclaimer has been given to [*insert names and addresses of persons to whom notice of disclaimer has been given*]

Dated this _____ day of _____ 18 _____

Trustee

Address _____

(f) *Disclaimer of lease with leave of court* (No 120B)

Pursuant to an order of Court dated the _____ day of _____ 18 _____, I, _____ the trustee of the property of the above-named bankrupt, hereby disclaim all interest in the lease dated the _____ day of _____ 18 _____, whereby the premises [*insert description of the property disclaimed*] were demised to _____ at a rent of £ _____ per annum, for a term of _____

Notice of this disclaimer has been given to _____

Dated this _____ day of _____, 18 _____

Trustee

(g) *Notice of disclaimer without the leave of the court* (No 120C)

(Title)

Take notice that, by writing under my hand, bearing date the _____ day of _____, 18 _____, I, _____, the trustee of the property of the above-named bankrupt, disclaimed [*the lease dated the _____ day of _____ or as the case may be*] of the premises known as [*insert description of property disclaimed*] which were let to _____ [*on a _____ tenancy or for the term of _____ years, or as the case may be*] at a rent of £ _____ per [*add where necessary*] "pursuant to notice dated the _____ day of _____ 18 _____"

DISCOVERY OF DEBTOR'S PROPERTY AND DOCUMENTS

(cont)

his knowledge that a particular debt is false may be the subject of a criminal charge (see *ib* , p 170)

Wide powers may be exercised by the court in order to ascertain the whereabouts of the debtor's property and documents relating to his estate, and the existence of any debts due to the estate By s 27 (1) of the B A , 1883 " At any time after a receiving order the court may, on the application of the official receiver or trustee, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects of the debtor, or who is supposed to be indebted to the debtor, or any person whom the court may deem capable of giving information respecting the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property "

(ii) *Refusal to attend* If any person so summoned, after having been tendered a reasonable sum, refuses to come before the court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the court at the time of the sitting and allowed by it, the court may, by warrant, cause him to be apprehended and brought up for examination (*ib* , s s (2)) Such person may be examined on oath, either by word of mouth or by written interrogatories (*ib* , s s (3))

It seems that the court may order the examination of the trustee, and will in a proper case make an order for that purpose on the application of a creditor (*Ex p Crossley, In re Taylor*, 1872, L R 13 Eq 409) Similarly, a creditor was examined where the bankrupt had a peculiar interest at the request of the bankrupt (*Ex p Austin*, 1876, 4 Ch D 13)

(iii) *Admission of indebtedness, etc.* If any person when examined admits his indebtedness, he may be ordered to pay the amount admitted to the official receiver or trustee (B A , 1883, s 27 (4)) , and if he confesses to having property of the debtor, he may be ordered to deliver it up (*ib* , s s. (5)) The court may order that any person who, if in England would be liable to be brought before it under this section, shall be examined in Scotland or Ireland, or in any other place out of England (*ib* , s s (6))

DISCOVERY OF DEBTOR'S PROPERTY AND DOCUMENTS (cont)

Every application to the court under this section must be in writing, and must state shortly the grounds upon which it is made (B R 78). An examination may be ordered for the purposes of discovery regardless of the question whether the court would entertain proceedings arising out of the examination (*Ex p Eckersley, In re Lewtas*, 1883, 48 L T 832)

(iv) **Who may apply for discovery** Although an application under this section must be made by the official receiver or the trustee, other persons may make it through the medium of the official receiver. In such a case the applicant must show a *prima facie* probability that some benefit will accrue to the estate or the creditors from the proposed examination (*Ex p Nicholson, In re Willson*, 1880, 14 Ch D 243). In that case James, L J, said (at p 247) "It would be a sad, a monstrous thing if anyone who claimed to be a creditor of a bankrupt was entitled *ex debito iustitiæ* to summon for examination anybody whatever whom he might wish to examine as to the estate and dealings of the bankrupt." Such an applicant must bear the costs incurred, unless the court otherwise directs (*Ex p Swift, In re Russell*, 1872, 26 L T 226)

(v) **What a witness may have to answer** Generally speaking, a witness summoned under this section must answer any question relating to the property or the dealings of the bankrupt, and if he refuse, the registrar may report him to the judge (B R 88). A witness other than the bankrupt may refuse to answer on the ground that the answer might incriminate him, in which case he will be allowed considerable latitude. It will be for the court to say whether the excuse is genuine (*Ex p Schofield, In re Firth*, 1877, 6 Ch D 230)

A witness may be cross-examined in order to test his credit (*In re Scharrer, Ex p Tilley*, 1888, 20 Q B D 518)

Bankrupt has no privilege The bankrupt, however, is entitled to no such privilege, as he is under a personal obligation to make a full disclosure of all his property (*ib*). In *Reg v Scott*, 1856, 25 L J M C 129, Lord Campbell said "The result seems to be that a question cannot be put to a bankrupt which does not touch

DISCOVERY OF DEBTOR'S PROPERTY AND DOCUMENTS

(cont.)

his trade dealings, or estate, or the direct object of which is to show he has committed a criminal act, yet he cannot refuse to answer a question which does touch his trade dealings, or estate, although the answer may tend to show that he has concealed his effects, or been guilty of any other offence connected with his bankruptcy "

(vi) **Privilege of solicitor** If a solicitor is called as a witness, he may refuse to disclose matters communicated to him while employed as solicitor. But he cannot refuse to disclose facts disclosed to him in his private capacity (*Ex p Campbell, In re Cathcart*, 1870, L R 5 Ch 703)

(vii) **Costs of witness** A witness summoned for examination is only entitled to his ordinary expenses (*Ex p Waddell, In re Lutscher*, 1877, 6 Ch D 328), and if he employs solicitor and counsel to represent him at the examination, he cannot, as a general rule, make a claim to the costs so incurred. It is noteworthy, however, that in that case, James L J, does say (at p 331) that where a man is charged with having property of the bankrupt in his possession, and is summoned to give evidence, it might possibly be said that there was a litigation between the parties, and that he was entitled to be protected by counsel.

(viii) **Discovery of documents and delivery of goods** The question whether a particular document relates to the bankrupt is for the court to decide, and a strong *prima facie* case must be made out (*Ex p Smith, In re Bevan & Co*, 1881, 45 L T 447). A solicitor cannot refuse to produce documents on the ground that he has a lien for services performed before the bankruptcy (*In re Toleman, Ex p Bramble*, 1880, 13 Ch D 885), and with regard to books of accounts belonging to the debtor, it is now expressly provided that no person shall, as against the official receiver or trustee, be entitled to withhold or set up any lien thereon (B R 349).

With regard to the delivery up of goods, an agent cannot be ordered to give up goods which he holds for his principal (*In re Davis, Ex p Goodman*, 1898, 5 Mans 329). The court expressed no opinion on the question whether an order could have been made under s 27 had Kirkwood been a respondent to the application when made in the court below.

DISQUALIFICATION OF BANKRUPT.

- (1) *Disqualifications enumerated*
- (2) *Disqualification for certain municipal duties*
- (3) *Removal of disqualification, meaning of "misfortune"*
- (4) *Vacating seat in House of Commons*
- (5) *Vacating municipal and other offices*

(1) *Disqualifications enumerated* Where a debtor is adjudged bankrupt, he shall, subject to the provisions of the Act of 1883, be disqualified for (a) Sitting or voting in the House of Lords, or on any committee thereof, or being elected as a peer of Scotland or Ireland to sit and vote in the House of Lords, (b) Being elected to, or sitting or voting in, the House of Commons, or on any committee thereof, (c) Being appointed or acting as a justice of the peace, (d) Being elected to or holding or exercising the office of mayor, alderman, or councillor, (e) Being elected to or holding or exercising the office of guardian of the poor, overseer of the poor, member of a sanitary authority, or member of a highway board, burial board, or select vestry, (f) Being elected to, or holding or executing the office of a member of a county council (B A, 1883, s 32 (1), as amended by 1890, s 9) These disqualifications extend to all parts of the United Kingdom (ib, s s (3)) They do not exceed a period of five years from the date of discharge (B A, 1890, s 9)

(2) *Disqualification for certain municipal duties* Further disqualifications are to be found in the Local Government Act, 1894, s 46 (1), which prevent an undischarged bankrupt being elected or being a member or chairman of a parish council, rural district council, or board of guardians, if he has within five years before his election, or since his election, been adjudged bankrupt or compounded with his creditors

(3) *Removal of disqualification* By s s (2) of s 32, it is provided that the disqualifications to which a bankrupt is subject under this section shall be removed and cease if and when (a) The adjudication of bankruptcy against him is annulled, (or (b) He obtains from the court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part

DISQUALIFICATION OF BANKRUPT (*cont*)

The court may grant or withhold such certificate as it thinks fit, but any refusal of such certificate shall be subject to appeal

An application for an order of discharge or a certificate of removal of disqualifications must be made in open court (B R' 6 (c))

Meaning of "misfortune" The bankrupt must show that his insolvency was caused by misfortune without any misconduct on his part The meaning of "misfortune" was considered in *In re Lord Colm Campbell*, 1888, 20 Q B D 816 There the debtor had instituted divorce proceedings against his wife and certain co-respondents on the ground of her adultery The jury found for the wife and the petition was dismissed, the debtor having to pay all costs His means to pay these, both before and after the proceedings, were wholly insufficient, and he was adjudged bankrupt It was held that the bankruptcy had *not* been "caused by misfortune, etc" in this case Lord Esher said (at p 821) "It is impossible to give an exhaustive definition of the meaning to be attached to 'misfortune' I think, however, we must hold that, when the bankruptcy is not solely the result of some accident over which, or over the direct conducting causes of which, the debtor has no control, it cannot be said to arise from 'misfortune'"

The conducting cause of the verdict was the fact of bringing and carrying on the suit, a matter which was entirely within the control of the debtor "

(4) *Vacating seat in House of Commons* · If a Member of the House is adjudged bankrupt, and the disqualifications arising therefrom under the Act are not removed within six months from the date of the order, the court shall, immediately after the expiration of that time, certify the same to the Speaker, and thereupon the seat of the member becomes vacant (B A , 1883, s 33 (1))

(5) *Vacating of municipal and other offices* If a person is adjudged bankrupt whilst holding the office of mayor, alderman, councillor, guardian, overseer, or member of a sanitary authority, highway board, or select vestry, his office shall thereupon become vacant (B A , 1883, s 34) (As to disqualifications of a person to hold the office of trustee in bankruptcy, see *Trustee*, p 319)

DISTINCT CONTRACTS

As to proof in respect of distinct contracts, see *Proof of Debts*, p 239

DISTRESS FOR RENT. (See Landlord and Tenant.)

DISTRICT

As to districts for official receiver, see *Official Receiver*, p 209, and as to the meaning of "county court district," see *Courts*, p 97

DIVIDENDS (and see Priority of Debts)

- (a) *Declaration and distribution, the first dividend, subsequent dividends, notices to creditors*
- (b) *Joint and separate dividends*
- (c) *Provision for creditors residing at a distance, etc*
- (d) *Right of creditor who has not proved debt before declaration of dividend, p 148*
- (e) *Final dividend, p 149*
- (f) *No action for dividend, p 149*
- (g) *Unclaimed dividend, p 149*
- (h) *Right of bankrupt to surplus, p 150*
- (i) *Statement to accompany notice of dividend, p 150*
- (j) *Forms relating to dividends, p 151*

(a) **Declaration and distribution** While retaining such sums as may be necessary for the costs of administration, the trustee must declare and distribute dividends as soon as possible (B A, 1883, s 58 (1))

The first dividend The first dividend must be declared and distributed within four months after the first meeting of creditors, unless the committee of inspection think there is good reason for postponement (ib, (2))

Subsequent dividends Subsequent dividends must be declared and distributed at intervals of not more than six months (ib, (3))

Notices to creditors Before declaring a dividend, the trustee must publish a notice in the *Gazette*, and also send notice to each creditor mentioned in the statement of affairs who has not proved (ib, (4)) On declaring a dividend he must also send a notice showing the amount and method of payment of the dividend, and giving the particulars of the estate in the prescribed form to each

DIVIDENDS (*cont*), (*index*, p 147)

creditor who has proved (*ib*, (5)) A dividend cannot be attached under the R S C, Ord xlv r 1 (*Prout v Gregory*, 1889, 24 Q B D 281), nor can it be made the subject of a charging order (*In re Cook, Ex p Cripps*, 1899, 1 Q B 863, and see *In re Mayne, Ex p O R*, 1907, 23 T L R 758)

(b) **Joint and separate dividends** Where one partner of a firm is adjudged bankrupt, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, cannot receive any dividend out of the separate property of the bankrupt until all the separate creditors have received the full amount of their respective debts (B A, 1883 s 59 (1))

Where joint and separate properties are being administered, dividends of the joint and separate properties must, subject to any order to the contrary that may be made by the court on the application of any person interested, be declared together The expenses of and incident to such dividends are fairly apportioned by the trustee between the joint and separate properties, regard being had to the work done for and the benefit received by each property (*ib*, s s (2))

Where a creditor was entitled to apportion certain securities towards his joint or separate debts, it was ordered on his application that the dividend upon the joint estate should be declared before the dividend on the separate (*Ex p Dickinson, In re Foster*, 1875, L R 20 Eq 767)

(c) **Provision for creditors residing at a distance, etc** In the calculation and distribution of a dividend, the trustee must make provision for debts due to persons resident in places so distant that in the ordinary course of communication they have not had sufficient time to tender their proofs, or to establish them if disputed, and also for provable debts which are the subject of claims not yet determined He must also make provision for any disputed proofs or claims, and for the administration expenses Subject to the foregoing provisions, he must distribute as dividend all money in hand (B A, 1883, s 60)

(d) **Right of creditor who has not proved debt before declaration of a dividend** A creditor who has not proved his debt before the declaration of any dividend or dividends is entitled to be paid out

DIVIDENDS (*cont*), (*index*, p 147)

of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive before that money is applied to the payment of any future dividend or dividends, but he cannot disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein (B A , 1883, s 61)

(e) *Final dividend* When the trustee has realised all the property of the bankrupt, or so much thereof as can, in the joint opinion of himself and of the committee of inspection, be realised without needlessly protracting the trusteeship, he declares a final dividend Before so doing he gives notice in manner prescribed to the persons whose claims to be creditors have been notified to him, but not established to his satisfaction, that if they do not establish their claims to the satisfaction of the court within a time limited by the notice, he will proceed to make a final dividend, without regard to their claims After the expiration of the time so limited, or any further time allowed by the court, the property of the bankrupt must be divided among the creditors who have proved their debts, without regard to the claims of any other persons (B A , 1883, s 62)

(f) *No action for dividend* . No action for a dividend lies against the trustee, but if he refuses to pay any dividend the court may, if it thinks fit, order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld, and the costs of the application (B A , 1883, s 63) An application must be made in the proper form See form (4) *infra*

Even after his release, if he has moneys of the debtor in his hands, an order under this section may be made against the trustee (*In re Prager, Ex p Société Cockerill*, 1876, 3 Ch D 115) Such an order would not, however be made in favour of one who had taken an assignment of a proved debt In such a case, however, Bigham, J , allowed the trustee to place a proof by the assignee on the file in place of that of the assignor (*In re Frost, Ex p O R* , 1899, 2 Q B 50)

A dividend cannot be attached to answer a judgment obtained against the creditor (*Prout v Gregory*, 1889, 24 Q B D. 281)

(g) *Unclaimed dividend* : If the trustee has any dividend in his

DIVIDENDS (*cont*), (*index*, p 147)

control which has been unclaimed for more than six months, or where, after paying a final dividend he has any unclaimed or undistributed moneys arising from the property of the debtor, he must pay the same to the Bankruptcy Estates Account at the Bank of England. A receipt given him by the Board of Trade is an effectual discharge (B A, 1883, s 162 (1)). Unclaimed dividends mean dividends which, although declared on existing and admitted proofs, have not been claimed (*In re Higginson and Dean, Ex p A G*, 1899, 1 Q B 325).

Where a trustee has any unclaimed or undistributed funds or dividends which he has received under any of the Bankruptcy Acts 1849-1869, or any petition, deed, etc., made under those Acts, and which have remained in hand for six months after the same became claimable or distributable, or, in any other case, for two years after the receipt thereof, he must pay them to the Bankruptcy Estates Account (B A 1883, s 162 (2) (a)). The Board of Trade may at any time call upon the trustee to render an account of the sums received under any such petition, etc., and may direct and enforce an audit of the accounts (*ib*, s s. (2) (b)). Such an account may be ordered although the trustee is discharged (*In re Chudley, Ex p B T*, 1884, 14 Q B D 402), and it need not be shown by the person asking for the account that the trustee has funds in hand (*In re Cornish, Ex p B T*, 1896, 1 Q B 99).

(h) **Right of bankrupt to surplus** The bankrupt is entitled to any surplus remaining after payment in full of his creditors, with interest, as by this Act provided, and of the costs, charges, and expenses of the proceedings under the bankruptcy petition (B A, 1883, s 65).

The bankrupt may dispose of the surplus by will or deed, even while the bankruptcy is pending and before the surplus is ascertained (*Bird v Philpott*, 1900, 1 Ch 822).

(i) **Statement to accompany notice of dividend** The statement which is to accompany a notice of dividend and application for release is contained in Form 122, which is too long to be set out here. It should specify, on the debit side, the net realisations. These are arrived at by deducting from the total receipts from the date of receiving order (including receipts from trading account)

Notice is hereby given that a dividend of _____ in the pound has been declared in this matter, and that the same may be received at _____ office, as above, on the _____ of _____ or on any subsequent _____ between the hours of _____

DIVIDENDS (*cont*), (*index*, p 147)

Upon applying for payment this notice must be produced entire together with any bills of exchange or other securities held by you, and if you do not attend personally, you must fill up and sign the subjoined Forms of *Receipt and Authority*, when a cheque payable to your order will be delivered to the bearer

(Signed)
G H, Trustee

NOTE—On application for the dividend, this notice must be produced entire, and the bills or other securities held by you must be produced

Receipt

18

Received of
shillings and
in respect of the
claim against this estate

the sum of
pence, being the amount payable to
dividend of
in the £ on

Creditor's Signature

£

Authority

SIR,

PLEASE deliver to [*insert the name of the person who is to receive the cheque, or the words "me by post," if you wish the cheque sent to you in that way*] the cheque for the dividend payable to _____ in this matter

Creditor's Signature

To

(4) *Form of application by creditor for order for trustee to pay dividend withheld, and order thereon* (No 127)

(Title)

I, F K, of _____, make application to this Court for an order to be made upon the trustee to pay the dividend in this bankruptcy due to me, with interest thereon for the time it has been withheld from me, that is to say, from the _____ day of _____ 188____, on which day I applied to the trustee for its payment to me, and also to pay to me the costs of this application

Dated this _____ day of _____, 188____

F K

Order

Upon the reading of this application, and upon hearing it is ordered that the trustee do forthwith pay to the said F K the sum of _____ pounds, the amount of such dividend

And it is further ordered that the trustee do pay to the said creditor at the same time the sum of _____, for interest on such dividend, being at the rate of 5¹/₂ per cent per annum for the time that its payment has been withheld, together with a further sum of _____ for the costs of this application

Dated this _____ day of _____, 188____

By the Court,
Registrar

(If the Court does not order payment, then, after the words "it is ordered," insert the order made)

DIVISIONAL COURT. (See Courts)

DOCUMENTS (See Books ; Discovery of debtor's property and documents)

- The court may order the attendance of any person at any time to produce documents (R 69). The falsification of documents is a contempt of court (R 348) The trustee may take possession of all documents of the bankrupt which are capable of manual delivery (B A , 1883, s 50 and see *Trustee*, p 333)

DOMICILE OF DEBTOR. (See also Bankrupt, p 46)

A debtor against whom a petition is presented must be domiciled in England As to the meaning of this phrase, see *Petition*, p 220 As to proof of domicile, see *Abroad*, p 1

DUPLICATE BILL OF SALE. (See Bills of Sale, p 57)

DUTY OF DEBTOR

(a) AS TO DISCOVERY AND REALISATION OF PROPERTY

- (i) *Generally*
- (ii) *To attend first meeting.*
- (iii) *To give inventory, etc , p 154*
- (iv) *To furnish accounts*
- (v) *To attend public examination*
- (vi) *To prepare statement of affairs, p 155*
- (vii) *To aid in realisation*
- (viii) *To attend hearing of petition*

(b) COMMITTAL OF DEFAULTING DEBTOR

(c) CONTEMPT OF COURT BY DEBTOR

(a) AS TO DISCOVERY AND REALISATION OF PROPERTY

(i) **Generally** Inasmuch as the debtor is the person who is best qualified to know the whereabouts and probable amount of his assets and liabilities, large powers are vested in the court to compel the debtor to render all possible assistance in the arrangement of his affairs

When examined as to his property and dealings, the bankrupt has no privilege, i e , he must answer incriminating questions (see *Discovery of Debtor's Property and Documents*, p 143)

(ii) **To attend first meeting** Thus it is provided that every debtor against whom a receiving order is made must, unless

DUTY OF DEBTOR (*cont*), *index*, p 153)

prevented by sickness or other sufficient cause, attend the first meeting of his creditors (as to which see *Meetings of Creditors*, p 193), and must submit to such examination and give such information as the meeting may require (B A , 1883, s 24 (1)) It has been decided that the debtor must be actually present in the room during the meeting (*Ex p Best*, 1881, 18 Ch D 488, and see *Ex p Solomon*, 1881, 20 Ch D 281)

(iii) To give inventory, etc The debtor must also give such inventory of his property, such list of his creditors and debtors, and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend such other meetings of his creditors, wait at such times on the official receiver, special manager, or trustee, execute such powers of attorney, conveyances, deeds, and instruments, and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be reasonably required by the official receiver, special manager, or trustee, or may be prescribed by general rules, or be directed by the court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the official receiver, special manager, trustee, or any creditor or person interested (B A , 1883, s 24 (2))

(iv) To furnish accounts In addition to giving inventories, supplying lists of creditors, and making out accounts, it is now provided (by B R 338) that a debtor shall, on the request of the official receiver, furnish trading and profit and loss accounts, and a cash and goods account for a period not exceeding two years before the date of the receiving order In addition to this, the court has power to order him to furnish accounts for a longer period If the debtor fail to comply with the requirements of the official receiver, or the order of the court, the court may take such action as it shall think just

A debtor cannot be compelled, under the provisions of the sub section just considered, to submit to an examination for life insurance (*In re Garnett, Ex p Bullock*, 1885, 16 Q B D 698)

(v) To attend public examination (see *Public Examination*, p 255)

DUTY OF DEBTOR (*cont*), (*index*, p 153)

(vi) To prepare statement of affairs (see *Statement of Affairs*, p 306)

- (vii) To aid in realisation The debtor must also, if adjudged bankrupt, aid to the utmost of his power in the realisation of his property, and the distribution of the proceeds among his creditors (B A , 1883, s 24 (3))

Realisation after discharge The duty of the debtor in regard to realisation does not come to an end at his discharge Although the discharge releases him from debts provable in bankruptcy, he must continue to perform the duties imposed on him by statute (*Ex p Waters*, 1874, L R 18 Eq 701)

(viii) To attend hearing of petition The debtor should attend the hearing of the petition As to non-appearance of debtor at hearing of petition, see *Petition*, p 229

(b) COMMITTAL OF DEFAULTING DEBTOR If a debtor wilfully fails to perform the duties so imposed upon him, or to deliver up any part of his property which is divisible amongst his creditors and which is in his possession or under his control, to the official receiver, the trustee, or other person authorised by the court, he shall in addition to any other punishment to which he may be subject, be guilty of a contempt of court, and may be punished accordingly (B A , 1883, s 24 (4))

(c) CONTEMPT OF COURT BY DEBTOR Any application to commit must be made to the court (B R 6), and must be supported by an affidavit (B R 85) Notice of the application must be personally served on the debtor not less than three days before the day fixed for the hearing (B R 86) The court may, however, in a proper case, allow substituted service, i e , by advertisement or otherwise, or it may allow a shorter notice (*ib*)

Sundays and holidays are not to be included in the three days (B A , 1883, s 141 (1) , and see *Ex p Ferrige*, 1875, L R 20 Eq 289)

Suspension of order . On hearing the application, the court may direct that the order of committal shall not issue if the debtor does the thing required within a specified time (B R 87)

So where a bankrupt refused to execute a power of attorney which was necessary to enable the trustee to deal with land abroad at a fair price, the court on motion to commit for contempt, under

DUTY OF DEBTOR (*cont*), (*index*, p. 153)

s 24, made the order for committal, but suspended it for a fortnight in order to give the bankrupt an opportunity for compliance (*In re G W Harris*, 1896, 3 Man 46, see also *In re Ashwin*, 1891, 8 Mor. 130, *In re Burgoyne*, *ib*, 139)

EARNINGS.

The personal earnings of a bankrupt pass to the trustee like other property (see *Property Divisible amongst Creditors*, p 244)

ECCLESIASTICAL BENEFICE. (See *Realisation of Property*, p 259)

EMPLOYMENT OF BANKRUPTS.

As to trusts arising from the employment of the bankrupt, see *Property not Divisible amongst Creditors*, p 250, and as to employment of bankrupt as manager, see *Trustee*, p 332

ENFORCEMENT

As to enforcement of orders, etc, see *Courts*, p 101, and as to enforcement of composition or scheme, see *Composition or Scheme of Arrangement*, p 87

ESTIMATE OF SECURITY (See *Secured Creditor*, p 289)

EVIDENCE (See *Proof of Debt.*)

- (1) *Generally*
- (2) *The Gazette as evidence*
- (3) *Of creditors' meetings*
- (4) *Of proceedings in bankruptcy.*
- (5) *Of appointment of trustee*
- (6) *How taken*
- (7) *On death of witness*
- (8) *Reference to rules*

(1) **Generally** The court will sometimes require evidence of consideration for a debt sought to be proved (see *Proof of Debt*, p 241) A judgment is *prima facie* evidence of a debt (see *ib* p 241) As to evidence of bankruptcy, the production of an order of discharge is conclusive (see *Discharge of Bankrupt*, p 129)

(2) **The Gazette as evidence** A copy of the *London Gazette* containing any notice inserted therein in pursuance of the Bankruptcy

EVIDENCE (*cont*)

Act is evidence of the facts stated in the notice, while a copy of the *Gazette* containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, is conclusive evidence in all legal proceedings of the order having been duly made, and of its date (B A, 1883, s 132) As to filing the *Gazette*, see R 17, all notices in the *Gazette* are gazetted by the B T (R 280)

(3) Of creditors' meetings A minute of proceedings at a meeting of creditors signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, must be received in evidence without further proof (B A, 1883, s 133 (1))

Until the contrary is proved, every meeting of creditors in respect of the proceedings whereof a minute has been so signed are deemed to have been duly convened and held, and all resolutions passed or proceedings had theréat to have been duly passed or had (*ib*)

(4) Of proceedings in bankruptcy Any petition, order, certificate, etc, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, will be receivable in evidence in all legal proceedings whatever (B. A, 1883, s 134)

(5) Of appointment of trustee. A certificate of the Board of Trade that a person has been appointed trustee under this Act, shall be conclusive evidence of his appointment

(6) How taken Evidence may, subject to general rules, be taken *vivâ voce*, by interrogatories, upon affidavit, or by commission abroad (s 105 (5)) With regard to *vivâ voce* evidence on motions, the practice now is that the party desiring to give it must give notice in writing to the other side, and if no objection is raised within a week the evidence will be taken thus, and no order will be required But if any objection is taken within the week, an application must be made to the court at the peril of the person objecting (see *Practice, note*, in 6 Mans, 287)

(7) On death of witness (see *Death*)

(8) References to rules As to affidavits, see Rs 428-430 (and see *Affidavit*), as to witnesses and depositions, see Rs 431-432 (and see *Witness*)

EXECUTION (See *Execution Creditor* , *Sheriff*)

An execution on the goods of a bankrupt may be an act of bankruptcy (see *Acts of Bankruptcy*, p 17) As to stay of execution, see *ib* , p 21 , and as to effect of execution where completed before date of receiving order, see *Execution Creditor, infra* .

As to when a sale under an execution must be by auction, see *Sheriff*, p 294 , and as to execution to enforce an administration order made in a County Court, see *Administration Orders*, p 28

EXECUTION CREDITOR (See *Execution* ; *Sheriff*)(a) **GENERALLY**(b) **RESTRICTION OF RIGHTS OF CREDITOR UNDER EXECUTION**(c) **MEANING OF TERMS USED —**(i) *Completion*(ii) *Available act of bankruptcy*, p 159(iii) *Execution, what is*(iv) *Completed by seizure and sale*(v) *Receipt of the debt*(d) **HOW EXECUTION CREDITOR AFFECTED BY THE DUTIES OF THE SHERIFF**

(a) **GENERALLY** An execution creditor of a bankrupt is not in the same position as an ordinary creditor He may or may not be secured , and the Bankruptcy Acts define his position very clearly

(b) **RESTRICTION OF RIGHTS OF CREDITOR UNDER EXECUTION** Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he cannot retain the benefit of the execution or attachment against the trustee unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor (B A , 1883, s 45 (1))

(c) **MEANING OF TERMS USED —**

(i) **" Completion "** An execution against goods is completed by seizure and sale , an attachment of a debt is completed by receipt of the debt , and an execution against land is completed

EXECUTION CREDITOR (*cont*), (*index*, p 158)

by seizure, or, in the case of an equitable interest, by the appointment of a receiver (*ib*, (2))

(ii) "Available act of bankruptcy" An available act of bankruptcy within this section is one which is available for a petition at the date of the petition on which the receiving order is made (B A, 1883, s 168 (1)), and an act of bankruptcy is available for a petition if committed within three months before its presentation (*ib*, s 6 (3))

(iii) "Execution," what is An execution creditor who has seized and sold may retain the benefit of his execution, although by virtue of B A, 1890, s 1, the seizure and sale is itself an act of bankruptcy (*ex p Villars, re Rogers*, 1874, L R 9 Ch 432) , but unless the execution is completed before the sheriff has been in possession for twenty-one days, the sheriff holding the goods for that time will avoid the execution (*Figg v Moore*, 1894, 2 Q B 690) A judgment creditor who has obtained an order for a receiver is not a creditor who has issued execution within this section (*In re Potts, Ex p Taylor & Sons*, 1893, 1 Q B 648)

(iv) "Completed by seizure and sale" It would seem that the sale is not complete until *all* the goods have been sold (*Ward v Dalton*, 1849, 18 L J C P 236) , but if a contract to sell be complete before the act of bankruptcy, and only formal acts are necessary to carry out the contract, those acts may be done after bankruptcy (see *Smith v Pickering*, 1791, 1 Peake N P 69, and other cases cited at *Williams*, p 238)

(v) "Receipt of the debt" . This means, apparently, receipt of the whole debt (*In re Ford, Ex p O R*, 1900, 1 K B 264) In that case part of the debt having been paid to the execution creditors, the sheriff withdrew under an authority to re-enter Before payment of the balance or re-entry, a receiving order was made against the debtor The trustee was held entitled to the amount paid to the execution creditors (see also *In re Jenkins*, 1904, 90 L T 65)

(d) HOW EXECUTION CREDITOR AFFECTED BY THE DUTIES OF THE SHERIFF Where the sheriff who is carrying out an execution on behalf of a creditor is served with notice of a receiving order, he must hand over the goods and money seized to the O R He must also pay to the O R the proceeds (less costs of execution) of goods sold or

EXECUTION CREDITOR (*cont*), (*index*, p 158)

money paid to avoid a sale, in respect of a judgment for a sum exceeding £20, on receiving, within fourteen days, *notice of a petition* by or against the debtor against whom a receiving order is afterwards made on that or some other petition of which the sheriff has notice (B A , 1890, s 11)

An execution creditor must, if called upon, satisfy a landlord's claim for a year's rent (see *Landlord and Tenant*, p 187)

As to how far an execution creditor is affected by the relation back of the trustee's title, see *Title of Trustee*, p 313

An execution creditor may appear to oppose an application by the sheriff for leave to sell by private sale under another execution (see *Sheriff*, p 294)

EXECUTOR.

Where the estate of a person dying insolvent is administered in bankruptcy, the petition must be served on each executor (see *Deceased Insolvent Debtor*, p 112) As to the executor's right of retainer, see *ib* , p 112

EXTENSION OF TIME (See Time)**EXTRAVAGANCE**

The fact that a bankrupt has been guilty of extravagance in living may prevent his discharge (see *Discharge of Bankrupt*, p 127)

FACTOR

As to whether goods entrusted to a factor are within his order and disposition, see *Reputed Ownership*, p 273

FALSE CLAIM

Any person untruthfully stating that he is a creditor of a bankrupt, for the purpose of inspecting the statement of affairs, shall be guilty of a contempt of court, and shall be punishable on the application of the trustee or official receiver (B A , 1883, s 16 (4)).

FEES

The following is the scale of fees and percentages payable on various documents connected with a bankruptcy It is dated Dec 18, 1890 (amended on May 11, 1891)

FEES (*cont.*).

Table A

	£	s	d
• Every declaration by a debtor of inability to pay his debts	0	5	0
Every bankruptcy notice	0	5	0
Every bankruptcy petition	5	0	0
NOTE.—When on a debtor's petition the Official Receiver gives a certificate that there is reasonable ground for believing that the assets are sufficient to meet the expenses of administration, this fee shall not be charged			
Every bond with sureties	0	10	0
Every affidavit filed, other than proof of debts	0	2	0
Every subpoena or summons under section 27 of the Act of 1883	0	1	0
For taking an affidavit or an affirmation, or attestation upon honour, in lieu of an affidavit or a declaration, except for proof of debts, and except declaration by a shorthand writer under Rule 67 (Form 38), for each person making the same	0	1	6
And in addition thereto for each exhibit therein referred to and required to be marked	0	1	0
On every proof of debt above 2 <i>l</i> (other than proof for workmen's wages under Rule 220)	0	1	0
For Registrar of County Court certifying lists of proofs in each bankruptcy under Rule 225 <i>a</i>	0	2	0
Every petition under section 125 of the Act of 1883	5	0	0
Every receiving order under section 103 of the Act of 1883	5	0	0
Every application for an order of discharge, including expense of gazetting	1	10	0
And for each creditor to be notified	0	1	0
Every application for search other than by petitioner, trustee, bankrupt, or any officer of the Court	0	1	0
Every application to the Court, except by the Official Receiver when acting either as Official Receiver or trustee	0	5	0
Every office copy, each folio of 72 words	0	0	4
On every record of trial	5	0	0
or such less sum as the Court may specially order			
Every allocatur by the Taxing Officer of the Court for any costs, charges, or disbursements —			
Where the amount allowed shall not exceed 4 <i>l</i>	0	2	0
Where the amount exceeds 4 <i>l</i> , for every 2 <i>l</i> allowed or a fraction thereof	0	1	0
Every application to an Official Receiver to appoint a special manager or to carry on the business of a debtor	0	5	0
Every application by a committee of inspection to the Board of Trade for a local banking account	1	0	0
Every Order of the Board of Trade for a local banking account	2	0	0
Every application by a trustee to an Official Receiver acting as committee of inspection under Rule 337 —			
Where the assets are certified by the Official Receiver as not likely to realise more than 500 <i>l</i>	0	5	0
Where the assets are likely to exceed 500 <i>l</i>	0	10	0
Every application under section 162 of the Act of 1883 to the Board of Trade for payment of money out of the Bankruptcy Estates Account, and every application for the reissue of a lapsed cheque or money order in respect of moneys standing to the credit of the Bankruptcy Estates Account	0	2	6

FEES (cont)

Every application to the Court to approve a composition, a fee computed at the following rates on the gross amount of the composition, viz, 1*l* on every 100*l* or fraction of 100*l* up to 5,000*l*, and 10*s* on every 100*l* or fraction of 100*l* beyond 5,000*l*

Every application to the Court to approve a scheme of arrangement, a fee computed at the following rates on the gross amount of the estimated assets (but not exceeding the gross amount of the unsecured liabilities), viz, 1*l* on every 100*l* or fraction of 100*l* up to 5,000*l*, and 10*s* on every 100*l* or fraction of 100*l* beyond 5,000*l*

Provided that where a fee has been taken on a previous application to the Court to approve a composition or scheme, or where a fee has been paid under this Table on the cash book submitted for audit, seven-eighths of the amount thereof shall be deducted from the fee payable on an application to approve a composition or scheme

On one copy of the cash book showing assets realised, forwarded by the Official Receiver or trustee to the Board of Trade, a fee according to the following scale on the gross amount of the assets realised and brought to credit, viz 1*l* on every 100*l* or fraction of 100*l* up to 5,000*l*, and 10*s* on every 100*l* or fraction of 100*l* beyond 5,000*l* Provided that, where a fee has been taken on an application to approve a composition or scheme of arrangement, seven-eighths of the amount thereof shall be deducted from this fee

On every application for release by trustees in non-summary cases a fee of 2*s* 6*d* on every 100*l* or fraction of 100*l* of assets realised and brought to credit

Table B

	<i>£</i>	<i>s</i>	<i>d</i>
For every Receiving Order made on a debtor's petition, where the fee on the petition has been dispensed with in pursuance of the Official Receiver's certificate as to sufficiency of assets	5	0	0
For every Order of administration made on transfer of proceedings under section 125 (4) of the Act of 1883 and section 21 (2) of the Act of 1890	5	0	0

On the net assets realised or brought to credit by the Official Receiver, whether acting as interim receiver, receiver, or trustee, after deducting any sums paid to secured creditors in respect of their securities and not being assets realised by a special manager or moneys received and spent in carrying on the business of the debtor, and on the net assets realised by an Official Receiver when acting as Trustee to administer a debtor's property under a composition or scheme, after deducting any sums paid to secured creditors in respect of their securities, and not being moneys received and spent in carrying on the business of debtor, a percentage according to the following scale —

On the first 1,000 <i>l</i> or fraction thereof	5 <i>l</i>	per cent
„ next 1,500 <i>l</i> „ „	4 <i>l</i>	„
„ „ 2,500 <i>l</i> „ „	3 <i>l</i>	„
„ „ 5,000 <i>l</i> „ „	2 <i>l</i>	„
On all further sums	1 <i>l</i>	„

FEEES (cont)

On the amount distributed to creditors by the Official Receiver when acting as trustee under a composition —

On the first 500 <i>l</i> or fraction thereof	2 <i>l</i> per cent
„ next 500 <i>l</i> „ „	1½ <i>l</i> „
„ „ 1,000 <i>l</i> „ „	1 <i>l</i> „
On all further sums	½ <i>l</i> „

On the amount distributed in dividend by the Official Receiver, when acting as trustee under adjudications, schemes, or Orders of administration of the property of a deceased insolvent, a percentage according to the following scale —

On the first 1,000 <i>l</i> or fraction thereof	2½ <i>l</i> per cent
„ next 1,500 <i>l</i> „ „	2 <i>l</i> „
„ „ 2,000 <i>l</i> „ „	1½ <i>l</i> „
„ „ 5,000 <i>l</i> „ „	1 <i>l</i> „
On all further sums	½ <i>l</i> „

For the Official Receiver acting as interim receiver of the property of a debtor, in addition to the percentage chargeable on realisations, on every order

£ s d
3 0 0

And, in addition, where the order is in force for a longer period than fourteen days, for every seven days after the first fourteen, and for every fraction of seven days

1 0 0

For each notice by an Official Receiver to a creditor of a first or any other meeting, or sitting of the Court —

Where the estimated value of the assets exceeds 100*l* each notice 0 1 0

Where the estimated value of the assets does not exceed 100*l* —

On the first twenty notices each notice 0 1 0

For each notice above twenty 0 0 6

For each notice by an Official Receiver to a creditor of an adjourned meeting or an adjourned sitting of the Court

0 0 6

For the Official Receiver supervising a special manager or the carrying on of a debtor's business, where the estimated assets exceed 100*l*, a fee according to the following scale —

If the gross assets are estimated by the Official Receiver not to exceed 500 <i>l</i>	1 <i>l</i> per week
If to exceed 500 <i>l</i> but not to exceed 5,000 <i>l</i>	2 <i>l</i> „
If to exceed 5,000 <i>l</i> but not to exceed 10,000 <i>l</i>	3 <i>l</i> „
If to exceed 10,000 <i>l</i> but not to exceed 20,000 <i>l</i>	4 <i>l</i> „
If to exceed 20,000 <i>l</i>	5 <i>l</i> „

Room for meeting or adjourned meeting of creditors summoned by Official Receiver, for each creditor to whom notice has been given of such meeting, but not exceeding in summary administrations 2*l* for each meeting, and in non-summary administrations not exceeding 5*l* for each meeting

0 1 0

Travelling, keeping possession, and other reasonable expenses of Official Receiver, the amount disbursed

For official stationery, printing, books, forms, and postages, each estate —

For every ten applications to debtors to an estate, or fraction of ten 0 2 0

For every ten creditors or fraction of ten where the estimated assets exceed 100*l* 0 10 0

Where the estimated assets do not exceed 100*l* —

For every ten creditors or fraction of ten up to twenty 0 10 0

For every ten creditors or fraction of ten above twenty 0 5 0

FEES (cont.)

On every payment under section 162 of the Act of 1883 of money out of the bankruptcy estates account threepence on each pound or fraction of a pound to be charged as follows —

Where the money consists of unclaimed dividends, on each dividend paid out,

Where the money consists of undistributed funds or balances, on the amount paid out

Table C

	£	s	d
High bailiff for attending sittings of the Court, under each Receiving Order, in summary case, per case	0	4	0
High bailiff for attending Court in non-summary cases, per case	0	6	0
Serving every bankruptcy notice, bankruptcy petition, or subpoena or receiving or other order (not serviceable by post) within two miles, including affidavit of service	0	3	6
If serviceable by post	0	1	0
Executing every warrant of seizure, or search warrant, or warrant of apprehension, or order of commitment within two miles of Court	0	10	0
Keeping possession under a warrant, for each day the man is actually in possession, including affidavit of possession being actually kept	0	4	6
(Not less than 3s 6d of the above sum is to be paid to the man in possession, and his receipt produced)			
High bailiff's or (in the London district) officer's man, travelling to place of possession, or to execute a warrant of or order of commitment, or to serve a summons or subpoena, or for any other purpose specially directed by the Court, per mile	0	0	5
His time, per day, where distance exceeds 10 miles	0	4	6
His expenses, per day	0	1	6
If high bailiff of a County Court or bankruptcy officer of Supreme Court directed by the Court personally to travel, per mile	0	0	7
His time, per day	0	10	0
His expenses, per day	0	10	0

Table D

The fees and allowances payable on proceedings had after the 1st day of January, 1891, in respect of any matter which was pending in any Court having jurisdiction in bankruptcy on the 31st day of December, 1883, shall be the same as if those proceedings had been taken before such last-mentioned day, and shall be applied to the same purposes. Provided that where the Official Receiver acts as trustee under the provisions of sections 159, 160, and 161 of the Act of 1883, the fees payable shall be the same scale as that provided under Table D for realisations and distributions by the Official Receiver when acting as trustee under an adjudication.

Where the Official Receiver acting as trustee under sections 159, 160, or 161 executes any conveyance or transacts any legal or other business at the instance of third parties, the parties interested shall be required to pay for his time occupied and for that of his clerks according to such scale as the Board of Trade may from time to time prescribe, and to pay all legal or other necessary expenses incurred by him.

FEES (*cont*)*Table E*

For every order of administration under section 122, two shillings in the pound on the total amount of the debts scheduled from time to time, excluding any fraction of a pound in such total

*Table F **

On each account transmitted by a trustee under a deed of arrangement in pursuance of section 25 of the Bankruptcy Act, 1890,† a fee upon the gross amount of the assets realised and brought to credit or the gross amount of the composition distributed during the period comprised in the account, according to the following scale —

	£	s	d
On every 100 <i>l</i> or fraction of 100 <i>l</i> up to 500 <i>l</i>	0	5	0
On every 100 <i>l</i> or fraction of 100 <i>l</i> above 500 <i>l</i>	0	2	6
Provided that the above fee shall not be chargeable on accounts transmitted by a trustee under a deed of arrangement registered prior to the 1st of January, 1891			
On every application in pursuance of section 25 of the Bankruptcy Act, 1890, to inspect the accounts of a trustee under a deed of arrangement	0	1	0
For every copy of or extract from such account furnished by the Board of Trade, each folio of 72 words or figures	0	0	4

We, the undersigned Lords Commissioners of Her Majesty's Treasury, do hereby sanction the foregoing scales of fees and percentages, and do direct that the fees to be taken by stamps shall be those mentioned in Tables A ‡ and F, and that the fees mentioned in Tables B, C, D, and E shall be taken in money, except that such of the fees and allowances referred to in Table D, as have hitherto been taken by stamps shall continue to be taken by stamps, the stamps to be used shall be bankruptcy fee stamps

And we further direct that wherever practicable the stamp shall be affixed or the money paid in respect of every fee mentioned in Tables A, B, C, D, and F, before the proceeding is had in respect of which the fee is payable, and that the charge to be made by the *London Gazette* for the insertion of each notice authorised by the acts or rules shall be five shillings

Herbert Eustace Maxwell

Sidney Herbert

Dated the 19th day of December, 1890

FELON.

A felon can be made bankrupt, see *Bankrupt*, p 44 The fact that a bankrupt is a convicted felon affects his right to discharge (see *Discharge of Bankrupt*, p 124)

* The new Table F was substituted for the previous Table F by the Order of 1891

† 53 & 54 Vict c 71

‡ But see Orders of December 19, 1890, April 13, 1896, and February 2, 1899, printed at pp 240, 243 of the King's Printers' copy of the B R

FINAL DIVIDEND. (See Dividends)

FINAL JUDGMENT (See Acts of Bankruptcy, p 20)

FIRM. (See Partners and Joint Debtors)

FIRST DIVIDEND (See Dividend)

FIRST MEETING (See Meetings of Creditors)

FIXTURES.

Under Bankruptcy Law . Before allowing a trustee to disclaim a lease the court may make such orders with regard to fixtures as the court thinks just (B A , 1883, s 55 (3) , and see *Disclaimer*, p 134) Fixtures attached to the freehold are not within the reputed ownership clause (*Horn v Baker*, 1808, 2 Sm L C 228 , and see *Reputed Ownership*, p 271)

Under Bills of Sale Acts The " personal chattels " to which these acts apply includes (*inter alia*) fixtures , but it does not include fixtures (except certain trade machinery) when assigned together with an interest in the land or building to which they are affixed (see, further, *Bills of Sale*, p. 54)

FOREIGNER.

As to whether and how far foreigners are subject to the English law of bankruptcy, see *Bankrupt*, p 45.

FORMS

The following is an alphabetical list of the forms printed in this work —

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Affidavit by bankrupt whose discharge has been granted conditionally as to after-acquired property or income, p 125

Affidavit by special manager, p 192

Affidavit in support of application to enforce composition, p 87

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FORMS (*cont*)

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Bill of sale given by way of security for money, p 60

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Consent of bankrupt to judgment being entered as condition of discharge, p 125

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Disclaimer after notice, p 140

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Disclaimer without notice, p 140

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Meeting to appoint new trustee, notice of, p 196

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Notice by debtor of intention to oppose petition, p 227

Notice of disclaimer with leave of court, p 140

Notice of disclaimer without leave of court, p 140

Notice of dividend, p 151

Notice of intention to disclaim lease, p 139

Notice to debtor of application for adjudication, p 26

Notice to declare dividend, p 151

Notice to disclaim leaseholds sublet or mortgaged, p 139

Notice to landlord of intention to disclaim lease not sublet or mortgaged, p 139

FORMS (*cont*)

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- Order for payment of dividend p 152
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- Petition, by creditor, p 225
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- Proposal for a scheme of arrangement p 80
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- Public examination, memorandum of, p 255
- Receiving orders, 265 266
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- Resignation of trustee, minutes of meeting for receiving p 196
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- Resolution accepting scheme of arrangement p 81.
- Resolution for adjudication, p 194
- Special manager, affidavit, by, p 192
- Trustee, appointment of new p 323
- Workmen, proof of debt for, p 239

FORMAL DEFECTS

No proceeding in bankruptcy is invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court

No defect or irregularity in the appointment or election of a receiver, trustee, or member of a committee of inspection shall vitiate any act done by him in good faith (B A 1883, s 143).

As to defects in affidavits, see R 54

FRAUDULENT ASSIGNMENT (See Acts of Bankruptcy, p 13)

FRAUDULENT CONVEYANCE. (See Acts of Bankruptcy, p 13)

FRAUDULENT DEBTORS

(a) **GENERALLY**

(b) **OFFENCES UNDER THE DEBTORS ACT 1869, p 169, *et seq*** —

(1) *Failure to make full discovery*

FRAUDULENT DEBTORS (cont).

- (2) *Failure to deliver up property*
- (3) *Failure to deliver up books*
- (4) *Concealment of property or debts*
- (5) *Removal of property*
- (6) *Omission in statement of affairs*
- (7) *False debts, failure to disclose*
- (8) *Preventing production of books, etc*
- (9) *Concealment, mutilation, falsification of books, p. 171*
- (10) *False entries*
- (11) *Parting with, altering books, etc*
- (12) *Fictitious losses*
- (13) *Obtaining credit on false representations*
- (14) *Falsely carrying on business*
- (15) *Pawning or pledging property obtained on credit*
- (16) *Obtaining consent of creditors by false representations*
- (c) **MISCELLANEOUS OFFENCES, p 172, et seq —**
 - (1) *Abconding with property*
 - (2) *Fraudulently obtaining credit, etc*
 - (3) *Obtaining credit over £20.*
 - (4) *False claim by creditor*
- (d) **PROCEDURE, p 174 —**
 - (1) *Power to order prosecution*
 - (2) *Power of court to commit for trial*
 - (3) *Duty of Public Prosecutor*
 - (4) *Effect of discharge on criminal responsibility*

(a) **GENERALLY** The various offences with which debtors, bankrupts (whether discharged or not), and other persons having to do with a bankrupt estate may be charged, can be summarised as follows .—

(b) **OFFENCES UNDER THE DEBTORS ACT, 1869** This Act makes provision for the criminal prosecution of any debtor who contravenes the law of bankruptcy Section 11 of that Act (as amended by s 26 of the B A , 1890) provides that any person adjudged bankrupt, shall in each of the following cases be deemed guilty of a misdemeanour, and on conviction may be imprisoned for two years with hard labour

FRAUDULENT DEBTORS (*cont*), (*index*, p 158)

(1) **Failure to make full discovery** If he does not to the best of his knowledge and belief, fully and truly discover to the trustee all his property, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intent to defraud If a debtor is so charged, the onus of proving "no intent" lies upon him (*R v Bolus*, 1870, 23 L T 339) The sub-section applies to after-acquired property (*R v Mitchell*, 1881, 43 L T 572)

(2) **Failure to deliver up property** If he does not deliver up to the trustee, property in his custody or under his control, and which he is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud

(3) **Failure to deliver up books, etc** If he does not deliver up to such trustee, or as he directs, all books, etc, in his custody or under his control relating to his property or affairs, unless the jury is satisfied that he had no intent to defraud

(4) **Concealment of property or debts** If after the presentation of a petition by or against him, or within four months next before that date, he conceals any part of his property to the value of £10 or upwards, or conceals any debt due to or from him, unless the jury is satisfied that he had no intent to defraud

(5) **Removal of property** If after the presentation of a bankruptcy petition by or against him, or within four months next before such presentation, he fraudulently removes any part of his property of the value of £10 or upwards

(6) **Omission in statement of affairs** If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud

(7) **False debts, failure to inform trustee of** If, knowing or believing a false debt has been proved by any person under the bankruptcy, he fail for the period of a month to inform the trustee thereof

(8) **Preventing the production of books, etc.** If after the presentation of a petition by or against him he prevents the production of any book, etc, affecting or relating to his property

FRAUDULENT DEBTORS (*cont.*), (*under*, p 168)

or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law

(9) Concealment, mutilation, falsification, etc., of books, etc

If after the presentation of a petition by or against him, or within four months next before such presentation, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, etc., of any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law (see s 26 of the B A, 1890, which slightly modifies this section)

(10) False entries : If after petition by or against him, or within four months next before the date of the petition, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law

(11) Parting with, altering books, etc. • If after the presentation of a petition by or against him, or within four months next before such presentation, he fraudulently parts with, alters, or makes any omission, or is privy to the fraudulently parting with, altering, or making any omission in any document affecting or relating to his property or affairs

(12) Fictitious losses If after the presentation of a petition by or against him, or at any meeting of his creditors within four months next before such presentation, he attempts to account for any part of his property by fictitious losses or expenses

(13) Obtaining credit on false representations If within four months next before the presentation of a petition by or against him, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same

NOTE—In order to secure a conviction under this provision it is necessary to show not only that there has been a false representation, but that it was by means of that representation that the goods were obtained (*Ex p Stallard, In re Howard*, 1868, L R 3 Ch 408)

(14) Falsely carrying on business If within four months next before the presentation of a petition by or against him he, being a trader, obtains under the false pretence of carrying on business

FRAUDULENT DEBTORS (*cont.*), (*index*, p 168)

and dealing in the ordinary way of his trade, any property on credit, and has not paid for the same, unless the jury is satisfied that he had no intent to defraud

(15) Pawning or pledging property obtained on credit If within four months next before the presentation of a petition by or against him, he, being a trader, pawns, pledges or disposes of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit and has not paid for, unless the jury is satisfied that he had no intention to defraud

(16) Obtaining consent of creditors by false representation If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to any agreement with reference to his affairs or his bankruptcy

(c) MISCELLANEOUS OFFENCES —

(1) Absconding with property . If any person who is adjudged bankrupt, or in respect of whose estate a receiving order has been made, either after the presentation of a petition against him, or within four months before such presentation, quits England and takes with him or attempts to take any property to the amount of £20 or upwards, which ought by law to be divided among his creditors, he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of felony, and punishable with two years' imprisonment (Debtors Act, 1869, s 12, B A, 1883, s 163) The conviction of an infant under this section since the passing of the Infants' Relief Act, 1874, was held bad, as it was not shown that any debts for necessities actually existed (*R v Wilson*, 1879, 5 Q B D 28)

(2) Fraudulently obtaining credit, etc. : Sec 13 of the Debtors Act, 1869, provides that in the following cases a person shall be deemed guilty of a misdemeanour, and shall be liable to be imprisoned for any time not exceeding one year —

(1) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud It has been held that a man who goes into a restaurant and orders a meal, having no means to pay, but without making any representation as to his ability, is liable to be convicted of obtaining credit by fraud (*R. v. Jones*, 1898, 1 Q B. 119)

FRAUDULENT DEBTORS (*cont*), (*index*, p 168)

(ii) If he has, with intent to defraud his creditors, or any of them, made or caused to be made any gift, delivery, or transfer of or any charge on his property

(iii) If he has, with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him.

It is not necessary, in order to render a person liable under this sub-section, that he should either be a bankrupt or have liquidated his affairs (*R v Rowlands*, 1882, 8 Q B D 530) The facts in that case show that considerable care must be exercised by those who are inclined to institute proceedings under the section The indictment charged the defendant with removing his goods since the date of the judgment "with intent to defraud his creditors," and the evidence was that the goods were removed with the object of defeating the judgment creditor, and there was no evidence on the part of the defendant to defeat any other creditors, or indeed that he had any other creditors It was held that the defendant could not be convicted, inasmuch as an intent to defraud "creditors" was charged, but was not proved.

(3) Obtaining credit over £20 . Where an undischarged bankrupt obtains credit to the extent of £20 or upwards from any person, without informing such person that he is an undischarged bankrupt, he is guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act, 1869 (B A , 1883, s 31)

This has been held to be an offence for which the maximum punishment is only one year's imprisonment (*R v. Turner*, 1903, 20 T L R. 67). It is not necessary to show an intent to defraud (*R v Dyson*, 1894, 2 Q B 176), and if credit is in fact obtained, there need be no agreement to give it (*R v Peters*, 1886, 16 Q B D 636)

(4) False claim by creditor : If any creditor in any bankruptcy wilfully and with intent to defraud makes any false claim, or any proof, declaration or statement of account which is untrue in any material particular, he shall be guilty of a misdemeanour, punishable with imprisonment not exceeding one year, with or without hard labour (Debtors Act, 1869, s 14)

FRAUDULENT DEBTORS (*cont.*), (*index.* p 168)

(d) PROCEDURE —

█(1) **Power to order prosecution** Where a trustee in bankruptcy (or the official receiver, see B A , 1883, s 164) reports that a bankrupt has been guilty of an offence under the Debtors Act, the court may, if satisfied on the representation of any creditor or member of the committee of inspection that the bankrupt is guilty, and that there is reasonable probability of a conviction, order the trustee to prosecute (Debtors Act, 1869, s 16) A debtor cannot appeal from an order under this section (*Ex p Marsden*, 1876, 2 Ch D 786) The court will not try the question whether the evidence is sufficient to induce a jury to find the prisoner guilty, but a prosecution will not be directed on mere suspicion (*Ex p Stallard*, *In re Howard*, 1868, L R 3 Ch 408 See also *In re Dunn*, *Ex p Senior Official Receiver*, 1902, 1 K B 107) If a prosecution is ordered, the expenses are allowed and paid as expenses of prosecutions for felony are allowed and paid (Debtors Act, 1869, s 17).

(2) **Power of court to commit for trial** Where there is ground to believe that the bankrupt or any other person has been guilty of the offences above referred to, the court may commit him for trial (B A , 1883, s 165 (1)), and may take depositions, and bind over witnesses to appear, admit the accused to bail, or otherwise , but nothing in this sub-section shall be construed as derogating from the powers or jurisdiction of the High Court (*ib.* , s s (2))

(3) **Duty of Public Prosecutor** If the court orders a prosecution to be undertaken for any offence under the Debtors Act, 1869, or the Acts amending it, or for any offence arising out of or connected with any bankruptcy proceedings, the prosecution must be taken up by the Director of Public Prosecutions (B A , 1883, s 166)

(4) **Effect of discharge on criminal responsibility** Where a debtor has been guilty of any criminal offence, he does not become exempt from prosecution by reason that he has obtained his discharge, or that a composition or scheme of arrangement has been accepted or approved (*ib.* , s 167)

FRAUDULENT PREFERENCE (and see Voluntary Settlement).

(a) *Provisions of B A , 1883, s 48*

(b) *Is an act of bankruptcy.*

FRAUDULENT PREFERENCE (cont.).

- (c) *Effect of the section 48*
- (d) *What is a preference?* p 176
- (e) *Person preferred must be a creditor,* p 176
- (f) *"Suffer a judicial proceeding,"* p 177
- (g) *"Within three months,"* p 177
- (h) *Distinguished from undue preference,* p 177
- (i) *Proof of fraudulent preference,* p 177
- (j) *Where given after arrest,* p 177
- (k) *Effect of, on order of discharge,* p 177
- (l) *Application to avoid settlement as a,* p 177

(a) Provisions of B. A., 1883, s. 48, as to Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy (B. A., 1883, s. 48 (1))

This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt (ib., s. s (2))

(b) Is an act of bankruptcy If a debtor makes any conveyance or transfer of his property, or any part thereof, or creates any charge thereon which would under this section be void as fraudulent preference, he commits an act of bankruptcy (B. A., 1883, s. 4 (1)).

(c) Effect of the section 48. The kind of transaction against which this section is directed may be thus illustrated Suppose that a man whose total liabilities are £1,000, owes £500 to one creditor, and that his sole asset consists of shares valued at £500 If he transfers those shares to the one creditor, with a view to giving him a preference, he deprives all his other creditors of any dividend Such a transaction would be void as against the trustee if made within three months of the date of the petition But having regard to sub-sect. (2), if the creditor so preferred were to again transfer

FRAUDULENT PREFERENCE (*cont*), (*index*, p 175)

the shares to a third person, who took in good faith and for valuable consideration, the trustee could not follow them into the hands of that third person

(d) What is a preference In order that a transaction may be set aside in accordance with the section, it is essential (1) That the conveyance, etc., should be by a person unable to pay his debts as they become due, (2) That it should be made with a view to giving a creditor a preference over other creditors (*Williams*, p 250)

It is sufficient to constitute the statutory fraudulent preference that the preferring the creditor was the substantial, effectual, or dominant view with which the debtor made the preference It is not necessary that this was his sole view (*Ex p Hill, In re Bird*, 1883, 23 Ch D 695) The word "preference" implies a voluntary act on the part of the debtor, so if a payment is made by him under pressure, this will be no preference, unless, indeed, the desire to prefer was the dominant view operating on the mind of the person who made the payment (see *In re Bell, Ex p O R*, 1892, 10 Mor 15).

A payment by a person who knows himself to be insolvent, but who is continuing to carry on his business, of his trade bills (in due course, *In re Eaton & Co*, 1897, 2 Q B 16), will not of itself constitute a fraudulent preference, the inference being that the payment was made, not to prefer the creditor, but enable the debtor to carry on his business (*In re Clay & Sons, Ex p Trustee*, 1896, 3 Mans 31) Payments made—in pursuance of a precedent contract, in apprehension of legal proceedings, where the debtor honestly believes he is under legal obligation, with a view to preventing a surety being called upon to pay,—have been held not to be fraudulent preferences (see generally *Sharp v Jackson*, 1899, A C 419, and cases enumerated in *Williams*, p 252)

(e) Person preferred must be a creditor. The section only relates to transactions between debtor and creditor Payment to a person who has merely entrusted the bankrupt with money for a particular purpose is not a fraudulent preference (*Ex p Kelly*, 1879, 11 Ch D 306) Payment to a surety, however, may have a fraudulent preference inasmuch as he can prove as a creditor for his contingent liability (*In re Paine, Ex p. Read*, 1897, 1 Q.B 122) That case, however, was distinguished a few years later when it was held that a payment made by a co-surety with a view to relieving a co-surety was

FRAUDULENT PREFERENCE (*cont*), (*index*, p 175)

no fraudulent preference (*In re Warren, Ex p Trustee*, 1900, 2 Q B, 138)

(f) "Suffer a judicial proceeding" It is obvious that by letting judgment go by default, a debtor might effect a preference in favour of the judgment debtor (as to this see *Ex p Lancaster, In re Marsden*, 1883, 25 Ch D 311)

(g) "Within three months" • In calculating the period of three months, the day of the presentation of the petition is to be excluded (*In re Dawes, Ex p O R*, 1897, 4 Mans 117) The reason why transactions of this kind entered into at some time before the bankruptcy ought to be set aside was thus stated by Lord Ellenborough "It occurred to those who presided in the courts, that it was unjust to permit a party, on the eve of bankruptcy, to make a voluntary disposition of his property in favour of a particular creditor, leaving the husk to the rest" (*De Tastet v Carroll*, 1815, 1 Stark 88) A payment made *after* the petition is not affected by this section, although it may otherwise be impeached as contrary to the bankruptcy laws (*In re Badham, Ex p Palmer*, 1893, 10 Mor 252)

(h) Distinguished from undue preference The fact that an *undue* preference is given to a creditor, is ground for refusing the discharge (see *Discharge*, p 128) An *undue* preference is wider than a fraudulent preference To pay a creditor in full although he was likely to be a preferred creditor, would be to show him undue preference (*In re Bryant*, 1895, 1 Q B 420)

(i) Proof of fraudulent preference The onus of proving that a transaction is a fraudulent preference lies on the trustee (*In re Lawrie*, 1898, 5 Man 48) It seems that it will not be sufficient for the trustee to show that the debtor was insolvent, he must give some evidence of a desire to prefer on the part of the debtor (*ib*)

(j) Where given after arrest No payment or composition made or security given after arrest under s 25 of the B A, 1883, is exempt from the provisions of the Act relating to fraudulent preference (B A, 1883, s 25)

(k) Effect of, on order of discharge (See *Discharge*, p 126)

(l) Application to avoid settlement as a fraudulent preference : An application to set aside a settlement, etc, on the ground that

FRAUDULENT PREFERENCE (*cont*), (*index* p 175)

it is a fraudulent preference is made in court (B R 6 (e)), but it must be made in the interests of the estate generally. Thus the trustee should not allow it to be made in his name where the object is, not to benefit the creditors generally but one creditor who holds a security on the property dealt with (*Ex p Cooper In re Zucco* 1875, L R 10 Ch 510)

FRAUDULENT SETTLEMENT.

A fraudulent settlement may have a serious effect upon the bankrupt's right to discharge. See *Discharge of Bankrupt* p 128

FREEHOLD PROPERTY.

The freehold property of a bankrupt may be disclaimed by the trustee if it is burdened with onerous covenants (see *Disclaimer*, p 134)

FRIENDLY SOCIETY.

Where the officer of a friendly society becomes bankrupt, the trustees of the society are entitled to come in as preferred creditors (see *Priority of Debts*, p 233)

GAMBLING.

The fact that a bankrupt has brought on or contributed to his bankruptcy by gambling may seriously affect his discharge (see *Discharge of Bankrupt*, p 127)

GARNISHEE

A garnishee order absolute is not a final judgment (*ex p Chinnery*, 1884, 12 Q B D 342 and see *Acts of Bankruptcy* p 20 but the service of a garnishee order may operate as a stay of execution (*In re Connan*, 1888, 20 Q B D 690). A dividend cannot be garnished (*Prout v Gregory*, 1889, 24 Q B D 281)

GAZETTE. (See Evidence)

GENERAL RULES. (See Rules.)

GOODS

The term "goods," as used in the Bankruptcy Acts includes all chattels personal (see *Interpretation of Terms*). Goods are also included in "personal chattels" within the meaning of Bills of Sale Acts (see *Personal Chattels*). As to reputed ownership of goods, see *Reputed Ownership*, p 271

GOODS IN TRANSITU.

Goods *in transitu* may be stopped by the consignor at any time before they reach the trustee in bankruptcy. If stopped, they are not divisible amongst the creditors (see *Property Divisible amongst Creditors*, p 244)

GOODS OF A DEBTOR. (See Sheriff, p 295.)

GOODWILL.

The trustee may sell the goodwill of a bankrupt's business (1883, s 56 (1), and see further *Trustee*, p 328)

GRANTOR OF BILL OF SALE.

As to the rights and liabilities of the grantor of a bill of sale, see *Bill of Sale*, p 65

GROWING CROPS.

Growing crops are subjected to special treatment under the law relating to bills of sale (see *Bills of Sale*, p 63). They are not within the reputed ownership clause (see *Reputed Ownership*, p 271)

GUARDIAN (See Disqualifications of Bankrupt.)

GUARANTEE.

From a proof on a guarantee there must be deducted payments made by, or dividends declared on the estate of, the principal debtor before proof made, but such payments or dividends received after proof made need not be deducted (*In re Blakeley*, 9 Mor 173, and see *Commercial Bank of Australia v Wilson*, 1893, A C 181)

HIGH COURT. (See Courts.)

HIRING AGREEMENT.

A *bonâ fide* hiring agreement is not a bill of sale (see *Bills of Sale*, p 55)

HOUSE OF COMMONS. (See Disqualifications of Bankrupt.)

HOUSE OF LORDS. (See Court, Disqualifications of Bankrupt.)

HUSBAND AND WIFE.

Loans by wife to husband: Where a wife lends her husband money for the purposes of his trade or business, such money is to be treated as assets in his bankruptcy subject to the right of the wife to claim as a creditor postponed to certain other creditors (See *Debts Provable in Bankruptcy*, p 106, and see *Priority of Debts*, p 234) As to whether and how far a wife's property passes to the trustee in her husband's bankruptcy, see *Property Divisible amongst Creditors*, p. 246.

INTEREST (*cont*)

debt which has been proved includes interest, payment of the excess of interest over 5 per cent will be deferred until the debts are paid in full (see *ib*, p 240) As to interest on debts payable at a future time, see *ib*, p 240, and as to proof for interest on a creditor's debt, see *ib*, p 240 If a trustee retains a sum exceeding £50 for more than ten days, he may have to pay interest thereon at £20 per cent (see *Accounts*, p 4) Interest paid by a local bank forms part of the debtor's estate (Act of 1883, s 74) Provision for the payment of interest must be properly set out in a bill of sale (see *Bills of Sale*, p 64)

INTERIM RECEIVER

Generally It is the duty of the official receiver to act as interim receiver pending the appointment of trustee (see *Official Receiver*, p 210)

Appointment of interim receiver The court may, if it is shown to be necessary for the protection of the estate, at any time after the presentation of a bankruptcy petition, and before a receiving order is made, appoint the official receiver to be interim receiver of the property of the debtor, or of any part thereof, and direct him to take immediate possession thereof or of any part thereof (B A, 1883, s 10 (1))

The application (see form, *infra*) for an interim receiver may be made by creditor or the debtor himself, and must be supported by affidavit (R 170) Before the order is granted the person making the application must deposit £5 towards the prescribed fee for the O R, and any further sum as the court may direct (R 172), and additional sums may have to be paid (R 173) If there is a receiving order subsequently made, the person who has paid fees for the interim receiver may possibly have his money refunded (see R 174) If petition is dismissed, the court has power to order payment of damages arising out of the appointment (R 175)

Form of application for interim receiver. (No 14)

(*Title*)

I, C D, of _____, do, on the grounds set forth in the annexed affidavit, apply to the Court to appoint the official receiver of this

INTERIM RECEIVER (*cont*)

Court as interim receiver of the property of the said *A B*, and [*here insert any special directions to the receiver that may be desired*]

Dated this day of 1888
(Signed) *C D*

Order thereon

Upon reading this application and the affidavit therein referred to, and hearing it is ordered that upon a deposit of £
being lodged by the applicant, the official receiver of this Court be thereupon constituted interim receiver of the property of the said *A B*, and [*here insert directions, if any*]

Dated this day of 1888
By the Court, Registrar

INTERPLEADER.

An interpleader order may operate as a stay of execution (see *Acts of Bankruptcy*, p 17) It has effect to interrupt the period of twenty-one days during which the sheriff holds goods within the meaning of s 4 (1) (e) (see *ib*, p 18)

INTERPRETATION OF TERMS

S 168 (1) of the Bankruptcy Act, 1883, provides that —“ In this Act, unless the context otherwise requires —

“ *The Court* ” means the Court having jurisdiction in bankruptcy under this Act

“ *Affidavit* ” includes statutory declarations, affirmations, and attestations on honour

“ *Available act of bankruptcy* ” means any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made

“ *Debt provable in bankruptcy*, ” or “ *provable debt*, ” includes any debt or liability by this Act made provable in bankruptcy

“ *Gazetted* ” means published in the *London Gazette*

“ *General rules* ” include forms

“ *Goods* ” includes all chattels personal

“ *High Court* ” means His Majesty's High Court of Justice

“ *Local bank* ” means any bank in or in the neighbourhood of the bankruptcy district in which the proceedings are taken

“ *Oath* ” includes affirmation, statutory declaration, and attestation on honour

“ *Ordinary resolution* ” means a resolution decided by a majority in value of the creditors present, personally or by proxy, at a meeting of creditors, and voting on the resolution

INTERPRETATION OF TERMS (*cont*).

"*Person*" includes a body of persons, corporate or unincorporate

• "*Prescribed*" means prescribed by general rules within the meaning of this Act

"*Property*" includes money, goods, things in action, land, and every description of property, whether real or personal and whether situate in England or elsewhere, also, obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined

"*Resolution*" means ordinary resolution

"*Secured creditor*" means a person holding a mortgage charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor

"*Schedule*" means schedule to this Act

"*Sheriff*" includes any officer charged with the execution of a writ or other process

"*Special resolution*" means a resolution decided by a majority in number and three-fourths in value of the creditors present, personally or by proxy, at a meeting of creditors, and voting on the resolution

"*Treasury*" means the Commissioners of His Majesty's Treasury

"*Trustee*" means the trustee in bankruptcy of a debtor's estate

As to interpretation of terms used in the Rules, see R 3, and R 3 of 1890

INTERROGATORIES (See Evidence)

INVENTORY.

As to how far an inventory of goods is a bill of sale, see *Bills of Sale*, p 53 As to the duty of a debtor to prepare an inventory of his property, see *Duty of Debtor*, p 154

IRELAND AND SCOTLAND.

The Bankruptcy Acts are not, except so far as is expressly provided, applicable to Scotland or Ireland (1883, s 2) The Irish and Scotch bankruptcy courts are, however, auxiliary to the English courts, and orders and warrants of English courts will be enforced

IRELAND AND SCOTLAND (*cont*)

there (*ib*, s 117) If it appears that the majority of creditors live in Ireland or Scotland, or that the estate should be administered there, a receiving order may be annulled (see *Receiving Order*, p 263).

JOINT AND SEPARATE DIVIDENDS (See Dividends)**JOINT AND SEPARATE ESTATE** (See Partners and Joint Debtors.)**JOINT CONTRACTS**

Where a bankrupt is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract without the joinder of the bankrupt (B A , 1883, s 114)

JOINT DEBTORS

The public examination of one of two joint debtors may in certain cases be dispensed with, see *Public Examination*, p 256 (See further, *Partners and Joint Debtors*)

JOINT TRUSTEES. (See Trustee, p 318)**JUDGE.** (See Courts)**JUDGMENT.**

A judgment is *prima facie* evidence of a debt (see *Evidence*, p 156), but a court of bankruptcy has power to go behind a judgment (*Ex p Revell*, 1883, 13 Q B.D 720, and see *Proof of Debt*, p 236) As to the meaning of " final judgment," see *Acts of Bankruptcy*, p 20

JUDGMENT DEBTOR.

A judgment debtor may have a bankruptcy notice served upon him (see *Bankruptcy Notice*, p 19) As to administration orders against judgment debtors, see *Administration Orders*, p 27, and R 358 , as to receiving order against a judgment debtor in lieu of committal, see *Acts of Bankruptcy*, p 24 , as to the committal of judgment debtors, see *Committal*, p 75 , and as to judgment summonses, see Rs 355, 362

JURISDICTION (See Courts , Registrars)**JURY**

As to trial by jury, see *Courts*, p 99

JUSTICE OF THE PEACE (and see **Disqualification**).

Affidavits may be sworn before a justice of the peace (1883, s 135), and he may witness a declaration by a debtor of inability to pay debts (R 135)

KEEPING HOUSE (See **Acts of Bankruptcy**, p 17)

LABOURERS (See **Clerks, Servants, and Labourers**.)

LANDLORD AND TENANT (see also **Disclaimer**).

(a) **WHERE TENANT BECOMES INSOLVENT** *Generally*

- (i) *Right of distress retained*
- (ii) *Meaning of "order of adjudication"*
- (iii) *Time for distress*
- (iv) *Actual distress necessary.*
- (v) *Where landlord paid to avoid distress*
- (vi) *Relationship of landlord and tenant*
- (vii) *Apportionment of rent*
- (viii) *Effect of discharge on landlord's remedies.*
- (ix) *When landlord postponed to preferred creditors*
- (x) *Distress within three months before receiving order.*
- (xi) *Where creditor has issued execution*
- (xii) *How affected by reputed ownership*

(b) **WHERE LANDLORD BECOMES INSOLVENT**, p 188

(c) **DISCLAIMER OF LEASE**, p 188

(a) **WHERE TENANT BECOMES INSOLVENT** *Generally*. The position of a landlord whose tenant becomes bankrupt is more advantageous than that of an ordinary creditor. His advantage arises from the fact that he is to a certain extent a secured creditor, inasmuch as he has certain rights of distress for rent, and the courts and the legislature are unwilling to interfere with those rights. His position may be thus summarised —

(i) **Right of distress retained**. The landlord may distrain upon the goods of the bankrupt for rent at any time, *ie*, either before or after the bankruptcy (B A, 1883, s 42 (1), as amended by B A, 1890, s 28), but if he distrain after the bankruptcy, the distress is only available for six months' rent accrued due prior to the order of adjudication. For the balance of the rent he must prove as an ordinary creditor (*ib*). This provision only applies to goods of

LANDLORD AND TENANT (*cont*), (*index*, p 185)

the bankrupt, so that the property of another person (as for instance a mortgagee) on the bankrupt's premises is liable to distress for the whole rent due (*Brocklehurst v Lawe*, 1857, 26 L J Q B, 107)

For rent due after adjudication the landlord is entitled to distrain (*Briggs v Sowry*, 1841, 8 M & W 729), even though it is a rent payable in advance, and for this purpose the leave of the court is not required (*Ex p Hale, In re Binns*, 1875, 1 Ch D 285)

Where rent is recoverable by distress, an entry to that effect must be made in the statement of affairs (see *Statement of Affairs* p 304)

(ii) Meaning of "order of adjudication" . The term "order of adjudication" includes an order for the administration of the estate of a debtor whose debts do not exceed fifty pounds, or of a deceased person who dies insolvent (*ib*, s 42 s s (2))

(iii) Time for distress The landlord may distrain at any time while the tenant's goods remain on the premises, although the trustee may have taken possession (*Ex p Grove*, 1747, 1 Atk 104, *In re Collins*, 1888, 21 L R Ir 508) or sold them (*Ex p Plummer*, 1739, 1 Atk 103)

(iv) Actual distraint necessary In order to get the advantage of the section, however, the landlord must actually distrain (*In re Suffield and Watts*, 1888, 20 Q B D 693), for if he permits the goods to be removed from the premises, he can only be considered as a common creditor, and must come in *pro rata* (*Ex p Descharmes*, 1742, 1 Atk 103)

The section does not protect a distress levied for a mere sham rent created to give a mortgagee an additional security in bankruptcy (*Ex p Williams, In re Thompson*, 1877, 7 C D 138) If the landlord forbears to distrain upon the undertaking of the trustee to treat the rent as a first charge (subject to the Preferential Payments in Bankruptcy Act, 1888) on the proceeds of sale, the order of payment will be (1) Preferential creditors, (2) Landlord (3) Costs of administration, etc (*In re Chapman*, 1894, 10 T L R 449)

(v) Where landlord paid to avoid distress A landlord who has a right to distrain for arrears of rent, and who receives payment, is entitled to retain the money against the trustee in bankruptcy (*Stevenson v Wood*, 1805, 5 Esp 200), although at the time of

LANDLORD AND TENANT (*cont*), (*index*, p 185)

payment there are no goods on the premises upon which a distress can be levied (*Mavor v Croome*, 1823, 1 Bing 261)

(vi) Relationship of landlord and tenant This need not be established for the purposes of this section by an ordinary lease, it may be created by the attornment clause in a mortgage deed (*Ex p Voisey, In re Knight*, 1882, 21 Ch D 442)

(vii) Apportionment of rent: Where the bankruptcy takes place during a current quarter, the landlord may by virtue of the Apportionment Act, 1870, distrain at the end of the quarter for rent due down to the date of adjudication (*In re Howell, Ex p Mandleberg & Co*, 1895, 1 Q B 844)

(viii) Effect of discharge on landlord's remedies An order of discharge does not release a debt for rent, or discharge the statutory remedies of a landlord (see *Newton v Scott*, 1842, 10 M and W 471)

(ix) When landlord is postponed to preferred creditors The six months' rent which the landlord can retain is not "distributed in the bankruptcy," and is therefore not subject to the payment of preferential debts. Where, however, the landlord distrains *before* the receiving order, he may have to recognize preferential claims

(x) Distress within three months before receiving order Where a landlord distrains within three months before the receiving order, certain debts to which priority is given, e.g., wages of servants, clerks, etc., are a first charge on goods so distrained on or the proceeds of their sale (*Pref Payments in Bank Act*, 1888, s 1 (4)) For a complete list of such debts, see *Priority of Debts*, p 231

(xi) Where creditor has issued execution Apart from the law of bankruptcy, it should be mentioned that a landlord has a right of priority over execution creditors. Thus, where under an execution put in by a creditor the sheriff has sold, the landlord of the execution debtor is entitled to one year's rent out of the proceeds of sale (8 Anne c 14). This right is not affected by s 11 of the B A, 1890 (q v., sub tit *Sheriff*, p 295) (*In re Mackenzie*, 1899, 2 Q B 566)

(xii) How affected by reputed ownership It has been shown that certain goods in the bankrupt's "possession, order, and

LANDLORD AND TENANT (*cont*), (*index*, p 185)

disposition" may become vested in the trustee by virtue of the doctrine of reputed ownership (see *Reputed Ownership, Order and Disposition*) Inasmuch as property cannot be vested in a man until he become bankrupt a clause in a building agreement to the effect that if the builder become bankrupt all materials on the premises shall vest in the landlord, has been held void (*Ex p Jay In re Harrison*, 1880, 14 Ch D 19) But a clause to the effect that on the failure of the builder to perform any part of his agreement the landlord may enter and seize materials is valid, and the landlord may re-enter even after the builder has committed an act of bankruptcy (*Ex p Newitt*, 1881, 16 Ch D 522) It was also held in that case that the reputed ownership clause did not apply, because the landlord did not become true owner until after re-entry

(b) **WHERE LANDLORD BECOMES INSOLVENT** Where a landlord becomes insolvent, his tenant must pay rent to the trustee to whom he may also have to attorn tenant The bankruptcy of a landlord determines a tenancy at will, because the reversion vests in the trustee (*Doe v Thomas*, 1851, 6 Ex 854) The bankruptcy of a person who has contracted to grant or to accept a lease does not, of itself, put an end to the contract (see *Fawcett's Law of Landlord and Tenant*, 3rd Ed, p 121)

(c) **DISCLAIMER OF LEASE** As to the effect of the disclaimer of a lease on a landlord, tenant, sub-lessee, and assignee of a lease, see *Disclaimer*, p. 133

LEASE.

As to the effect of a disclaimer of a lease by the trustee in bankruptcy, see *Disclaimer*, p 132

LETTERS

In certain cases all the letters sent to the debtor through the post may be ordered to be re-directed to the official receiver or trustee (see *Control over Person and Property of Debtor*, p 92) A creditor may express his assent to or dissent from a scheme by letter addressed to the official receiver (see B A, 1890, s 3 (4))

LIABILITY.

As to what liabilities are not released by an order of discharge, see *Discharge of Bankrupt*, p 13

LICENCE TO SEIZE.

A licence to seize goods may be a bill of sale (see *Bills of Sale*, p 53)

LIEN.

No lien can be claimed, as against the trustee, on any books of account belonging to a bankrupt (R 349, and see *Trustee*, p 333) Where the trustee is carrying on the debtor's business under a deed not avoided as an act of bankruptcy, he has a lien as against a judgment creditor on the property for liabilities thereby incurred by him (*Jennings v Mather*, 1902, 1 K B 1) The official receiver, too, has a lien on the estate for the balance of his costs (R 318 (2)).

A solicitor cannot set up a lien on documents of the bankrupt in his possession which are required to be produced in the bankruptcy Nor can the production of the debtor's books be refused because of a lien (see *Discovery, etc*, p 144) As to bankers' and agents' lien on securities, see *Property not Divisible amongst Creditors*, p 251

LIMITATIONS, STATUTE OF (See Statute of Limitations.)

LIMITED PARTNERSHIP. (See Partnership)

LIQUIDATED DEBT

The debt on which a petition is founded must be liquidated (B A , 1883, s 6 (1)) As to meaning of " liquidated debt," see *Petition*, p 220

LIQUIDATOR

The liquidator of a company issuing a bankruptcy notice must do so in the name of the company (*In re Murrieta*, 1896, 3 Man 35)

LIST OF CREDITORS

The trustee must, whenever required by any creditor so to do, and on payment by such creditor of the prescribed fee, furnish and transmit to such creditor by post a list of the creditors, showing in such list the amount of the debt due to each of such creditors (B A , 1883, s 79) The trustee or official receiver may charge for such list the sum of three pence per folio of seventy-two words, together with the cost of postage thereof (B A , 1890, s 16) The statement of affairs must contain a list of creditors (see *Statement of Affairs*, p 303)

LOCAL BANK.

As to the power of a trustee to open an account for the estate at a local bank, see *Accounts of Trustee*, p 3

LOCAL PAPER.

Notice of an order of adjudication (1883, s 20, R 193) and of the annulment of an adjudication (*ib* s 35), and seven days' notice of the first meeting of creditors (Sched I (2)) must be published in a local paper. In the case of a small bankruptcy, however, there is no advertisement in a local paper unless the Board of Trade specially directs (R 273 (1)). A copy of any such local paper must be left with the registrar (R 17 (3)).

LONDON BANKRUPTCY DISTRICT (See Courts, p 98)

LUNATIC

As to whether a lunatic can be made bankrupt, see *Bankrupt*, p 43. A lunatic may act by his committee or *curator bonis* (B A 1883, s 148, R 271). Where it is beneficial, the court may allow the committee or *curator bonis* to file a declaration of inability to pay debts (*In re James*, 1884, 12 Q B D 332), or even consent to an adjudication (*Ex p Graves*, 1881, 19 Ch D 1). The public examination of a lunatic debtor will not be held (see *Public Examination*, p 256).

MAINTENANCE OF BANKRUPT

The trustee has power by consent of the committee of inspection to make the bankrupt an allowance for maintenance (see *Trustee*, p 333).

MAINTENANCE OF SECURITY

A covenant in a bill of sale which is directed to the maintenance of the security does not invalidate the bill (see *Bills of Sale*, p 64).

MALICIOUS PRESENTATION OF PETITION. (See *Petition*, p 224)

MANAGER

- (i) *Generally.*
- (ii) *Power to appoint special manager*
- (iii) *Security and remuneration*
- (iv) *Forms of affidavit by.*

MANAGER (*cont*)

(i) **Generally** It is often desirable, both for the benefit of the debtor and the creditors, that a manager having special knowledge of the business of the debtor shall manage his affairs. The official receiver may, however, sometimes act as manager himself. (For his powers as manager, see *Official Receiver*, p 211)

(ii) **Power to appoint special manager** The official receiver may, on the application of any creditor, and if satisfied that the nature of the debtor's estate or business, or the interests of the creditors generally, require the appointment of a special manager of the estate or business other than the official receiver, appoint a manager thereof accordingly, to act until a trustee is appointed, and with such powers (including any of the powers of a receiver) as may be entrusted to him by the official receiver (s 12 (1))

The special manager must give security, and account in such manner as the Board of Trade may direct. He receives such remuneration as the creditors may, by resolution at an ordinary meeting, determine, or in default of any such resolution, as may be prescribed (B A , 1883, s 12). The official receiver has an absolute discretion as to whether or no he will appoint a special manager (*In re Whittaker*, 1884, 50 L T 510). A special manager is entitled to have reimbursed all expenses incurred by him during the pendency of the petition. This is true even in cases in which the petition is dismissed for lack of jurisdiction, for it is the duty of the court to protect its officers (*In re A B & Co* (No 2), 1900, 2 Q B 429). He may be authorised by the official receiver to raise money or make advances for the purposes of the estate, where it appears to be necessary in the interests of the creditors (B A , 1883, s 70 (1) (b)). The court may, on the application of the Board of Trade, order a manager to file accounts (*Ex p O R , In re Jones*, 1908, 1 K B 204).

(iii) **Security and remuneration** A special manager must give security as required by the Board of Trade (R 342), and where his remuneration is not fixed by the creditors, it is determined by the Board (R 343). He must account to the official receiver, and have his accounts verified by affidavit in the prescribed form (*vide infra*) (R 344).

MANAGER (cont)**(iv) Form of affidavit by special manager. (No 106)**

I, _____ of _____, make oath and say as follows —

1 The account hereunto annexed marked with the letter A, produced and shown to me at the time of swearing this my affidavit, and purporting to be my account as special manager of the estate or business of the above-named debtor, contains a true account of all and every sums and sum of money received by me or by any other person or persons by my order or to my knowledge or belief for my use on account or in respect of the said estate or business

2 The several sums of money mentioned in the said account hereby verified to have been paid or allowed have been actually and truly so paid or allowed for the several purposes in the said account mentioned

3 The said account is just and true in all and every the items and particulars therein contained according to the best of my knowledge and belief

Sworn, etc

MARRIAGE SETTLEMENT. (See Voluntary Settlement.)

A marriage settlement is not a bill of sale (see *Bills of Sale*, p 56)

MARRIED WOMAN

As to whether a married woman can be made bankrupt, see *Bankrupt*, p 42 In *Ex p Gulchrist, In re Armstrong* (1886, 17 Q B D 521), it was held that a married woman who has traded separately from her husband, and who had been adjudicated a bankrupt, could not be compelled to execute a deed exercising a general power of appointment in favour of the trustee in her bankruptcy But where a married woman, entitled to separate estate with a restraint on anticipation, trades separately from her husband and becomes bankrupt, her separate estate, subject to the restraint on anticipation, vests in her trustee in bankruptcy, and on the death of her husband in her lifetime, is assets for her creditors (*In re Wheeler's Settlement Trusts*, 1899, 2 Ch L 717) As to the issue of a bankruptcy notice against a married woman, see *Acts of Bankruptcy*, p 22 The separate property of a bankrupt married woman passes to her trustee in bankruptcy (see *Property Divisible amongst Creditors*, p 246) Nothing in the Bankruptcy Act, 1883, affects the provisions of the Married Women's Property Act, 1882 (B A, 1883, s 152)

Where a married woman lends money to her husband for the purposes of his business, she is deferred to the other creditors (see *Priority of Debts*, p 234)

MAYOR. (See Disqualifications of Bankrupt, p 146)

MEETING TO CONSIDER COMPOSITION (See Composition or Scheme of Arrangement, p 80)

MEETINGS OF CREDITORS.

(Cross references As to meetings of committee of inspection, see *Committee of Inspection*, p 77 , as to meeting of creditors for the purpose of considering a deed of arrangement, see *Deed of Arrangement*, p 116 , and as to the duty of the trustee with regard to summoning meetings, see *Trustee*, p 325)

(i) **FIRST MEETING —**

(a) *Generally*

(b) *Date.*

(c) *Attendance of debtor.*

(d) *Forms relating to*

(ii) **SUBSEQUENT MEETINGS**, p 196

(iii) **QUORUM**

(iv) **MINUTES**

(v) **VOTING AT MEETINGS**, p 197.

(vi) **PRODUCTION OF BILLS**, etc , p 197

(vii) **VOTING OF SECURED CREDITORS**, p 197

(viii) **CREDITOR HOLDING CURRENT BILL**, etc , p 198

(ix) **PROXIES**, p 198

(x) **SPECIAL PROXIES**, p 199.

(i) **FIRST MEETING** (a) **Generally** After a receiving order is made against a debtor, a general meeting of his creditors must be held for the purpose of considering whether a proposal for a composition or scheme of arrangement shall be entertained, or whether it is expedient that he should be adjudged bankrupt, and generally to consider the best mode of dealing with his property (B A , 1883, s 15 (1))

(b) **Date of first meeting** The first meeting is summoned by the official receiver for a date not later than fourteen days after the receiving order, unless the court thinks it desirable to appoint an earlier day (B A , 1883, Sched I (1)) Notice of the meeting is published in the *Gazette* (ib , (2)) The official receiver, or some person nominated by him, is chairman at the first meeting (ib , (7))

(c) **Attendance of debtor** The debtor must attend the first meeting unless prevented by illness, whether he has had notice of the meeting or not (R 249)

MEETINGS OF CREDITORS (*cont.*), (*index*, p 193)

(d) Forms relating to first meeting —

(1) *Affidavit of postage of notices First Meeting (No 84)*

(Title)

I, _____, a clerk in the office of the Official Receiver, make oath and say as follows —

1 That I did on the _____ day of _____ 188____, send to each creditor mentioned in the debtor's statement of affairs, and to the above-named debtor, a notice of the time and the place of the [*insert here if necessary, "adjourned" or "new" or "adjourned new"*] first meeting of creditors, accompanied by a summary of the debtor's statement of affairs in the form[s] hereunto annexed marked "A" and "B" respectively [*strike out the words underlined if summary not sent*]

2 That such notices were addressed to the said creditors respectively, according to their respective names and addresses appearing in the statement of affairs of the said debtor, and also to the said debtor at _____

3 That I sent the said notices by putting the same into the post office at _____ before the hour of _____ o'clock in the noon on the said day

Sworn, etc

(11) *Resolutions where adjudication resolved on (No 87)*

(Title)

Minutes of resolutions come to and proceedings had at the first meeting of creditors held at _____ this _____ day of _____ 188____, _____, chairman, the official receiver [*or the official receiver being absent, F K, of _____, chairman*]

Resolved as follows [unanimously] —

That A B shall be adjudged bankrupt, and that the official receiver do apply to the Court to make the adjudication

That G H, of [*residence and occupation*], shall be the trustee of the property of the bankrupt at [*here state remuneration*] [*or That the appointment of a trustee in this bankruptcy be made by the committee of inspection*]

That I K, L M, N O, P Q, and R S be appointed the committee of inspection in this bankruptcy, for the purpose of superintending the administration of the property of the bankrupt by the trustee

[*Here add any other resolutions that may be come to as to the manner of the administration of the property by the trustee, etc*]

F K, Chairman

[*The minutes should also give the assenting and dissenting creditors and the amounts of their proofs*]

NOTE —When a resolution is carried unanimously the creditors need not sign, but when a division is taken, all creditors and holders of proxies voting should sign. The signatures must be attached at the meeting. Resolutions should be put separately

(111) *Memorandum of adjournment of first or other meeting (No 91)*

(Title)

Before _____ at _____ on the _____ day of _____ 188____, at _____ o'clock

Memorandum —The [*"First" or as the case may be*] meeting of creditors in the above matter was held at the time and place above mentioned, and the

MEETINGS OF CREDITORS (*cont*), (*index*, p 193)

several proofs of debt lodged were produced, but it appearing that [*here state reason for adjournment*] the meeting was adjourned until the day of 188, at o'clock in the noon, then to be held at the same place

Chairman

(iv) *Memorandum of proceedings at adjourned first meeting* (No 92)

No quorum

(*Title*)

Before at on the day of
188, at o'clock

Memorandum — The adjourned meeting of creditors in the above matter was held at the time and place above-mentioned, and the several proofs of debt lodged were produced, but it appearing that there was not a quorum of creditors qualified to vote present or represented, no resolution was passed, and the meeting was not further adjourned

Chairman

(v) *Resolution accepting composition* (No 88)

(*Title*)

Minutes of resolutions come to and proceedings had at a meeting of creditors held at this day of 189, ,
Chairman

Resolved as follows — [*Insert "unanimously" where the resolution is so carried*]

That the debtor's proposal for a composition, as set forth in the annexed paper writing, marked "A," be accepted

[If the official receiver is not to be the trustee for the purpose of receiving and distributing the composition, add here resolutions appointing a trustee, and fixing his remuneration]

F K, Chairman

[*The minutes should also give the assenting and dissenting creditors and the amounts of their proofs*]

Norr — When a resolution is carried unanimously the creditors need not sign, but when a division is taken, all creditors and holders of proxies voting should sign. The signatures must be attached at the meeting. Resolutions should be put separately

(vi) *Application for extension of time for holding first meeting, and order thereon* (No 30)

(*Title*)

Ex parte the official receiver

I, A B, the official receiver in the above matter, apply to the Court for an extension of time to the day of 188, for holding the first meeting of creditors, on the ground following [*strike out such of the grounds as are not applicable*] —

That the said debtor has not submitted a statement of and in relation to his affairs in compliance with section 16 of the Bankruptcy Act, 1883

Or,

That the said debtor has obtained an extension of time for submitting a statement of and in relation to his affairs, viz, to the day of 188

MEETINGS OF CREDITORS (*cont*), (*indiv*, p 193)

(c) *Notice to creditors of meeting to remove trustee and to appoint a person to fill the vacancy* (No 107)

(Title)

- At the request of one-fourth in value of the creditors of the bankrupt a general meeting of the creditors is hereby summoned to be held at

on the _____ day of 188____, at _____ o'clock in the _____ noon, for the purpose of considering the propriety of removing *G H*, the trustee of the property of the bankrupt, from his office as such trustee, and in the event of his removal to appoint a person to fill the vacancy

Dated this _____ day of _____ 188____

L M,

A member of the Committee of Inspection
[or Official Receiver]

(iii) **QUORUM** A meeting may not act for any purpose except the election of a chairman, the proving of debts, and adjournment, unless there are present or represented at least three creditors, or all the creditors if their number does not exceed three (B A, 1883, Sched 1 (23))

(iv) **MINUTES** Minutes of the proceedings at each meeting are to be drawn up and signed by the chairman at the next meeting (*ib* (25))

(v) **VOTING AT MEETINGS** No person may vote as a creditor unless he has duly proved a debt provable in bankruptcy to be due to him from the debtor, and the proof has been duly lodged before the time appointed for the meeting (B A, 1883, Sched I 8), and a creditor may not vote at any such meeting in respect of any unliquidated or contingent debt, or any debt the value of which is not ascertained (*ib* (9)) "Unliquidated debts" include not only damages which are to be ascertained by a jury, but any debts of which the creditor fairly admits he cannot state the amount (*Ex p Ruffle, In re Dummelow*, 1873, L R 8 Ch 997) As to voting of creditor whose debt is due from a firm of which the bankrupt is a member, see *Partners and Joint Debtors*, p 215

(vi) **PRODUCTION OF BILLS, ETC** Any creditor who holds a bill of exchange or promissory note must produce it for the purposes of a proof which is to entitle him to vote (B R 221)

(vii) **VOTING OF SECURED CREDITORS** For the purposes of voting, a secured creditor must unless he surrenders his security, state in his proof the particulars and date of his security, and the value at which he assesses it, and may only vote in respect of the balance

MEETINGS OF CREDITORS (*cont*), (*index*, p 193)

(if any) due to him, after deducting that value If he votes in respect of the whole debt, he shall be deemed to have surrendered his security unless the court is satisfied that the omission to value has arisen from inadvertence (B A , 1883, Sched I (10)) A creditor who states that his security is worthless does not omit to value within this rule , nor does the fact that the valuation was based on erroneous information amount to inadvertence (*In re Piers*, 1898, 1 Q B 627) See also as to what constitutes inadvertence, *In re Rowe*, 1904, 2 K B 489) Where a creditor assesses the value of his security, and votes in respect of the balance, the trustee may have the security at the assessed value, with 20 per cent added (B A , 1883, Sched I (12)) , but where the creditor has valued, he may at any time before he is required to give up the security, correct such valuation by a new proof, and deduct such new value from his debt In that case, however, the addition of 20 per cent shall not be made if the trustee requires the security to be given up (*ib*)

(viii) CREDITOR HOLDING CURRENT BILL, ETC A creditor who holds a current bill of exchange or promissory note must not vote in respect thereof unless he is willing to treat the liability thereon of every person who is liable thereon antecedently to the debtor, and against whom a receiving order has not been made, as a security in his hands, and to estimate the value thereof, and for the purposes of voting, but not for the purposes of dividend, to deduct it from his proof (B A , 1883, Sched. I (11))

(ix) PROXIES A creditor may vote either in person or by proxy (B A , 1883, Sched I (15)) A proxy must be deposited with the official receiver or the trustee before the meeting at which it is to be used (*ib* (19)) Forms of proxies are to be sent to the creditors together with a notice summoning a meeting of creditors (B A , 1890, s 22 (2))

Form of general proxy. (No. 75)

(Title)

I, [*if a firm, write " we " instead of " I," and set out the full name of the firm*]
of _____, a creditor, hereby appoint [*here insert either " Mr*
of _____, a clerk, manager, etc , in my regular employ,"
or " the Official Receiver in the above matter "] *The standing of the person*

MEETINGS OF CREDITORS (*cont*), (*index*, p 193)

appointed must be clearly set out to be ["my" or "our"] general proxy in the above matter [*excepting as to the receipt of dividend see footnote 1*]

Dated this _____ day of _____, 189

Signed [*if a firm, sign the firm's trading title, and add "by A B, a partner in the said firm" As to signature by agent, see footnotes 2 and 3*]

Signature of Witness

Address

NOTES

1 When the creditor desires that his general proxy should receive dividends, he should strike out the words, "excepting as to the receipt of dividend," putting his initials thereto [*It is not intended that the Official Receiver shall in any case receive dividends on behalf of a creditor*]

2 The authorised agent of a corporation may fill up blanks, and sign for the corporation, thus —

For the

Company,

J S (duly authorised under the seal of the Company)

3 A proxy given by a creditor may be filled up and signed by any person having a general authority in writing to sign for such creditor. Such person shall sign —

J S (duly authorised by a general authority in writing to sign on behalf of [*name of creditor*]) [*The Official Receiver or trustee may require the authority to sign to be produced for his inspection*]

Certificate to be signed by Person other than Creditor filling up the above Proxy

I, _____ of _____, being a [*here state whether clerk or manager in the regular employment of the creditor, or a commissioner to administer oaths in the Supreme Court*], hereby certify that all insertions in the above proxy are in my own handwriting, and have been made by me at the request of the above-named _____ and in his presence, before he attaches his signature [*or in it*] thereto

Dated this _____ day of _____, 189

Signature

The proxy must be lodged with the Official Receiver or trustee not later than the day before the meeting at which it is to be used

(A) SPECIAL PROXIES A creditor may give a special proxy to any person to vote at any specified meeting or adjournment thereof on all or any of the following matters —

(a) For or against any specific proposal for a composition or scheme of arrangement

(b) For or against the appointment of any specified person as trustee at a specified rate of remuneration, or as a member of the committee of inspection, or for or against the continuance in office of any specified person as trustee or member of a committee of inspection

(c) On all questions relating to any matter, other than those above referred to, arising at any specified meeting or adjournment thereof (1890 s 22, s s (3)) A creditor may give a general proxy to his manager or clerk or any other person in his regular employment. In

MEETINGS OF CREDITORS (*cont.*), (*index*, p 193)

such a case the instrument of proxy shall state the relation in which the person to act thereunder stands to the creditor (B A, 1883, Sched I (17)) The official receiver may, however, be appointed by any creditor to act as general or special proxy (*ib* (21))

The proxy must be deposited with the trustee or the official receiver not later than the day before the meeting at which it is to be used (*ib* (19), B R 245 (2))

Form of special proxy. (No 76)

(Title)

I, [*if a firm, write "we" instead of "I," and set out the full name of the firm*] of _____, a creditor, hereby appoint [*here insert either "Mr" or "the Official Receiver in the above matter"*] as [*"my" or "our"*] proxy at the meeting of creditors to be held on the _____ day of _____ 189____, or at any adjournment thereof, to vote [*here insert the word "for" or the word "against," as the case may require, and specify the particular resolution or name of proposed trustee, remuneration, or other matter*]

Dated this _____

day of _____

, 189____

Signed [*if a firm, sign the firm's trading title, and add "by A B, partner in the said firm"*] As to signature by agent, see footnotes 1 and 2]

Signature of Witness

Address

NOTES

1 A creditor may give a special proxy to any person to vote at any specified meeting or adjournment thereof on all or any of the following matters —

- (a) For or against any specific proposal for a composition or scheme of arrangement
- (b) For or against the appointment of any specified person as trustee at a specified rate of remuneration, or as member of the committee of inspection, or for or against the continuance in office of any specified person as trustee or member of a committee of inspection
- (c) On all questions relating to any matter, other than those above referred to, arising at any specified meeting or adjournment thereof

2 The authorised agent of a corporation may fill up blanks and sign for the corporation, thus —

For the _____

Company _____

J S (duly authorised under the seal of the Company)

3 A proxy given by a creditor may be filled up and signed by any person having a general authority in writing to sign for such creditor. Such person shall sign —

J S (duly authorised by a general authority in writing to sign on behalf of [*name of creditor*])

[*The Official Receiver or trustee may require the authority to sign to be produced for his inspection*]

Certificate to be signed by Person other than Creditor filling up the above Proxy
I, _____, of _____, being a [*here state whether clerk or manager in the regular employment of the creditor, or a commissioner to administer*]

MEETINGS OF CREDITORS (*cont*), (*index*, p 193)

oaths in the Supreme Court] hereby certify that all insertions in the above proxy are in my own handwriting, and have been made by me at the request of the above-named _____ and in his presence before he attached his signature [*or mark*] thereto

• Dated this _____ day of _____, 189 _____
Signature

The proxy must be lodged with the Official Receiver or trustee not later than the day before the meeting at which it is to be used

MEMBER OF PARLIAMENT (See *Disqualifications of Bankrupt*, p 145)

METROPOLITAN COUNTY COURTS (See *Courts*, p 98)

MINOR (See *Infant*)

MINUTES

As to minutes at creditors' meetings, see *Meetings of Creditors*, p 197

MISCONDUCT OF BANKRUPT.

As to the effect of a bankrupt's misconduct on his application for discharge, see *Discharge of Bankrupt*, p 127, and as to the effect of a debtor's misconduct on the allowance of a composition or scheme of arrangement, see *Composition or Scheme of Arrangement*, p 82

MISDEMEANOUR.

The various misdemeanours of which a debtor may be guilty will be found set out sub tit *Fraudulent Debtors*, p 170

A debtor against whom a receiving order has been made must answer questions in his public examination, although they tend to criminate him (*Ex p Schofield, In re Firth*, 1877, 6 Ch D 230) Such statements would not be admissible against him on a subsequent prosecution but statements made in the statement of affairs are admissible (*Rex v Pike*, 1902 1 K B 552)

As to the effect of a misdemeanour on an application by the bankrupt for discharge, see *Discharge of Bankrupt*, p 124

MISFORTUNE

Where the insolvency has been caused by misfortune, and without misconduct on the part of a debtor, the court may remove the disqualification for certain offices which bankruptcy imposes (As to meaning of "misfortune," see *Disqualifications of Bankrupt*, p 146)

MONEY LENDERS (See Proof of Debts, p 240)

MOTIONS AND APPLICATIONS TO COURT

Applications to the court are made by motion supported by affidavit (1883, s 105 (5), R 27) Where parties other than the applicant are affected notice must be given, unless in a special case the court thinks the motion should be *ex parte* (R 28) The notice should be served not less than eight days before the hearing, but an application to give shorter notice may be made *ex parte* (R 29) A motion may be adjourned from time to time (R 32). Motions are generally heard at the sitting of the court in the order in which they are set down (R 37), (see generally, R 27-37)

MORTGAGE

As to power of trustee to raise money by mortgage of the debtor's property, see *Trustee*, p 331 As to how far a mortgage may be fraudulent, see *Acts of Bankruptcy*, p 14

MORTGAGE OF CHATTELS (See Bills of Sale)

MORTGAGED PROPERTY

(a) **Generally** The effect of a mortgage may have to be considered in bankruptcy in relation to debtor and creditor

(b) **Mortgage by a debtor** If a debtor mortgage *all* his property, and so put it out of the reach of his creditors, a question may arise as to whether the transaction is a fraudulent conveyance, and as such an act of bankruptcy (see *Acts of Bankruptcy*, p 14) A debtor may mortgage or pledge all his property by way of security for a present advance (*Whitwell v Thompson*, 1793, 1 Esp 67), and a mortgage of property to secure a present advance and a past debt is not, *per se*, an act of bankruptcy (see *Mercer v Peterson*, 1868, L R 3 Ex 304)

(c) **Creditor holding mortgage** A creditor who has a mortgage on the debtor's property may be *pro tanto* secured (see *Secured Creditor*) The following matters may be here considered —

(d) **Taking accounts of mortgaged property** Where a person claims to be mortgagee of part of a bankrupt's real or leasehold estate, the court may, on the application of the mortgagee, direct accounts to be taken (in the same manner as they are taken in the Chancery Division R 77), and point out the method in which the sale is to be conducted (R 73)

MORTGAGED PROPERTY (cont)

(e) **Proceeds of sale** · The proceeds of sale are applied first to the payment of the trustee's costs incurred in connection with the matter , and secondly, to payment of the mortgagee . If there is anything over, that goes to the trustee for the benefit of the estate . If the proceeds of sale are not sufficient to pay off the mortgagee, he may prove in the bankruptcy for the balance (R 75)

(f) **Mortgage by trustee** A trustee in bankruptcy may, with the consent of the committee of inspection mortgage the bankrupt's property in order to raise money for payment of debts (see *Trustee*, p 331)

MORTGAGEES

As to the effect of a receiving order on the remedies of persons who hold mortgages on the debtor's property, see *Receiving Order*, p 263

MUTUAL CREDIT AND SET-OFF.

- (a) *Generally*
- (b) *Object of the section*
- (c) *" Mutual credit "*
- (d) *Pecuniary liabilities necessary*
- (e) *Unliquidated damages*
- (f) *Mutual dealings*, p 205
- (g) *What mutuality necessary*
- (h) *Principal and agent*

(a) **Generally** Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made, and any other person proving or claiming to prove a debt under such receiving order, an account is taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party must be set off against any sum due from the other party and the balance of the account, and no more, can be claimed or paid on either side respectively . A person cannot, however, under this section claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him (B A 1883, s 38) (As to the meaning of an available act of bankruptcy, see *Available Act of Bankruptcy*)

MUTUAL CREDIT AND SET-OFF (*cont.*), (*index*, p 203)

(b) Object of the section “The object of this clause is not to avoid cross actions, for none would lie against assignees, and one against the bankrupt would be unavailing, but to do substantial justice between the parties, where a debt is really due from the bankrupt to the debtor to his estate” (See per Parke, B, in *Forster v Wilson*, 1843, 12 M & W 191)

(c) “Mutual credit” This is a wider term than “mutual debt” Although generally speaking debt and credit are correlative terms, and A giving credit to B may seem to imply that B is indebted to A, yet it may be admitted that the introduction of the words mutual credit extends the right of set-off to cases where the party receiving the credit is not debtor *in præsenti* to him who gives the credit (*per* Lord Brougham in *Young v The Bank of Bengal*, 1836, 1 Moo P C 150) Thus, there is mutual credit where A owes B money which is payable at once, and B owes A money payable at a future time

(d) Pecuniary liabilities necessary The right to set-off on the ground of “mutual credit” only arises where the claims can be reduced to money payment (*Eberle's Hotels Co v Jonas*, 1887, 18 Q B D 459) In that case it was sought to set up the price of certain cigars which had been valued against a debt It was held that there was no right of set-off, the section being only applicable where the claims on each side are such as result in pecuniary liabilities, whereas the right of the plaintiffs was to have goods returned Lord Esher, M R, said (at p 674), “An account cannot be taken, and a balance struck, in respect of a debt on one side and the liability to restore goods on the other” The balance after allowing for mutual credits should be struck as at the date of the receiving order (*In re Dainton, Ex p Mant*, 1900, 1 Q B 546)

(e) Unliquidated damages “The section in its present shape,” said Russell, C J, in *Palmer v Day & Sons*, 1895, 2 Q B 621, at p 621, “has been held applicable to all demands provable in bankruptcy, and so to include claims as well in respect of debts as of damages liquidated or unliquidated, provided they arise out of contract” See also *Peat v Jones*, 1881, 8 Q B D 147 A guarantee, being a contract to indemnify against contingent damages, cannot form the subject of a mutual credit (*Sampson*

MUTUAL CREDIT AND SET-OFF (*cont.*), (*index*, p 203)

v *Burton*, 4 Moo 515) The fact that one arises on a deed and the other on a simple contract does not prevent their being set off (*Ex p Law*, 1846, *De Gen*, 378)

(f) *Mutual dealings* The case of *In re Pollitt, Ex p Minor*, 1893, 1 Q B 455, affords an illustration of what debts cannot be set off under this section. A debtor consulted a solicitor to whom he was then indebted for costs. The solicitor declined to act further unless he were furnished with money to meet future costs, and the debtor placed money in his hands for that purpose. The solicitor then called the debtor's creditors together, and prepared a deed of assignment, which the debtor executed. The debtor was afterwards adjudged bankrupt, the act of bankruptcy being the execution of the deed of assignment. It was held by the Court of Appeal that there had not been mutual dealings between the debtor and the solicitor, and that he could not set off against the claim of the trustee a debt due to him from the debtor for professional services rendered before the money was placed in his hands. (See also *Lister v Hooson*, 1907, 24 T L R 162)

(g) *What mutuality necessary* The debts, etc., must be between the same parties. Thus a joint debt cannot be set off against a separate debt, nor a separate debt against a joint debt (*Ex p Twogood* (11 Ves 517). Further, the debts, in order to be set off must be due respectively in the same right, so a debt due to an executrix in that capacity could not be set off against a debt due to her personally (*Bishop v Church*, 1748, 3 Atk 691). Set-off, in equity, existed even before the statutes of set-off (*Bailey v Finch*, 1871, L R 7 Q B 34). A mutual credit may be constituted though the parties do not mean particularly to trust each other (*Hankey v Smith*, 1789, 3 T R 507).

(h) *Principal and agent* In an action by assignees of a bankrupt underwriter against insurance brokers for premiums due, the brokers may set off a loss before the bankruptcy upon a policy underwritten by the bankrupt and effected by the brokers in their own name for a principal for whom they were acting on a *del credere* commission (*Lee v Bullen*, 1858, 8 El & Bl 692). See also *George v Clagett*, 1797, 7 T R 359, *Cooke v Eshelby*, 1887, 12 A C 271).

MUTUAL DEALINGS. (See Mutual Credit and Set-off)

MUTUAL DEBT. (See Mutual Credit and Set-off)

NECESSARIES.

As to the meaning of necessities, see *Bankrupt*, p 42

NOTICE (and see Bankruptcy Notice)

(a) **GENERALLY** Notices must, as a rule, be in writing (R 13). All notices and other documents for the service of which no special mode is directed may be sent by prepaid post letter to the last known address of the person to be served therewith (B A, 1883, s 142) Where, however, notice of an order or other proceeding in court may be served by post, it must be sent by registered letter (R 92) A certificate by the official receiver, or his clerk, or an affidavit by the trustee or his solicitor, or the clerk of either, that the notice of any creditors' meeting or sitting of the court has been duly posted, is sufficient evidence of posting (R 253)

(b) **VARIOUS KINDS OF NOTICE** —

(i) **Of act of bankruptcy** (see *Protected Transactions*, p 254) It may be mentioned that notice of a petition for the administration of the estate of a deceased debtor is equivalent to notice of an act of bankruptcy so far as the legal personal representative is concerned (see *Deceased Debtor*, p 114)

(ii) **Of adjudication** A notice of adjudication must be gazetted and advertised (see *Local Paper*)

(iii) **Of application to rescind receiving order** This notice must be sent to the official receiver (R 134B)

(iv) **Of meetings of creditors** (See *Meetings of creditors*, p 193)

(v) **Of motion** (See *Motion*, *supra*)

(vi) **Of opposition to discharge of debtor** (See R 238A, and *Discharge of Bankrupt*, p 123)

(vii) **Of receiving order** Notice of a receiving order must be gazetted and advertised (see B A, 1883, s 13, R 182, and *Local Paper*) As to what amounts to notice of a receiving order, see *Sheriff*, p 295

(viii) **Of rejection or proof of debt** (See *Proof of Debts*, p 241)

OATH

An official receiver has power to administer an oath (see *Official Receiver*)

OCCUPATION

The name and occupation of the witnesses to a bill of sale must be accurately stated (see *Bills of Sale*, p 67)

OFFICE COPIES.

Office copies of affidavits may in all cases be used, the original having been previously filed and the copy duly authenticated with the seal of the court (R 55 (2)) Office copies of petitions, proceedings, affidavits, books, papers and writings required by trustee, debtor, or creditor are provided by the registrars (R 16)

OFFICERS (and see Official Receivers and Staff of B T)

Disabilities No registrar or other officer attached to any court having jurisdiction in bankruptcy can, during his continuance in office, be a member of the House of Commons , nor can he act either directly or indirectly as solicitor in any proceeding in bankruptcy or in any prosecution of a debtor by order of the court If he does so act, he is liable to be dismissed from office (B A , 1883, s 116)

Nothing in this section affects the right of any registrar or officer appointed before the passing of this Act to act as solicitor to the extent permitted by the B A 1869, s 69

Salary and superannuation See B A , 1883, s s 77, 128, 129

OFFICIAL RECEIVERS (and Staff of the Board of Trade).**(1) OFFICIAL RECEIVERS**

(a) *Appointment*

(b) *Deputy*

(c) *Duties*

(i) *Generally*

(ii) *Duties as regards the debtor, p 209*

(iii) *Duties as regards the estate, p 210*

(2) STAFF OF THE BOARD OF TRADE**(1) OFFICIAL RECEIVERS —**

(a) **Appointment of receivers .** The Board of Trade may appoint such persons as they think fit to be official receivers of debtors' estates, and may remove any person so appointed The official receivers of debtors' estates act under the general authority and

OFFICIAL RECEIVERS (*cont.*). (*index*, p 207)

directions of the Board, but are officers of the courts to which they are respectively attached (B A , 1883, s 66 (1))

The number of official receivers and the districts to be assigned to them are fixed by the Board with the concurrence of the Treasury. One person only is appointed for each district, unless the Board otherwise direct , but the same person may be appointed to act for more than one district (*ib* (2))

Where more than one official receiver is attached to the court, such one of them as is for the time being appointed by the court for any particular estate shall be the official receiver for the purposes of that estate (*ib* (3))

(b) **Deputy official receivers** The Board of Trade may from time to time direct that any of its officers shall be capable of discharging the duties of any official receiver during any temporary vacancy in the office, or during the temporary absence of any official receiver through illness or otherwise (B A , 1883, s 67 (1))

The Board may also direct in any special case that any of its officers shall be capable of discharging any part of the official receiver's duties, provided that no additional expense is thus incurred (B A , 1890, s 14)

The Board may also, on the application of an official receiver, at any time by order nominate some fit person to be his deputy, and to act for him for any time not exceeding two months, and under such conditions as to remuneration and otherwise as may be prescribed (B A , 1883, s 67 (2))

If a deputy is appointed, notice must be given to the registrar of the court to which the receiver is attached (R 321 (2)) An officer of the Board, or the clerk to an official receiver, has power to act for the receiver in certain cases, with the leave of the court (R 323 (c)), while a deputy may use proxies at a meeting of creditors (R 327)

(c) **Duties of official receiver** —

(1) **Generally** The duties of the official receiver have relation both to the conduct of the debtor and to the administration of his estate (B A , 1883, s 68 (1)) He may, for the purpose of affidavits

OFFICIAL RECEIVERS (*cont*), (*index*, p 207)

verifying proofs, petitions, or other proceedings, administer oaths (*ib* (2))

Expressions referring to the trustee under a bankruptcy generally speaking include the official receiver when acting as trustee (*ib* (3))

The trustee must supply the official receiver with such information and give him such access to the bankrupt's books and documents, and such aid as may be requisite for enabling the official receiver to perform his duties under the Bankruptcy Act (*ib* , (4))

Where there are two or more receivers attached to one court, any one of them may take over and perform the duties of another (B R 323B) It is for the Board of Trade to say what duties the receiver must perform personally, and in what cases he may act through a clerk or agent (B R 328) In an emergency the registrar of the court may act as official receiver (B R 330)

Where there is no committee of inspection, the functions of the committee which devolve on the Board of Trade are discharged by the receiver (B R 337) In any case of doubt or difficulty, the receiver may apply to the court for directions (B R 334)

The official receiver may hold a special or general proxy on behalf of any creditor at a creditors' meeting (see *Meetings of Creditors*, p 200)

As to the vesting of the estate of a deceased debtor in the official receiver, see *Deceased Insolvent*, p 113 Where goods of the bankrupt are in the hands of the sheriff at the date of the receiving order, the official receiver has power to demand them, subject to certain conditions (see *Sheriff*, p 295)

As to powers of official receiver under a receiving order, see *Receiving Order*, p 262

And as to the duty, etc., of the official receiver in a small bankruptcy, see *Small Bankruptcies*, p 297

As to report of official receiver on composition or scheme of arrangement, see *Composition*, etc p 82

(u) Duties as regards the debtor As regards the debtor, it is the duty of the official receiver —

(1) To investigate the conduct of the debtor and to report to the court, stating whether there is reason to believe that the debtor has committed any act which constitutes a misdemeanour under the Debtors Act, 1869, or any amendment thereof, or under this

OFFICIAL RECEIVERS (*cont.*), (*index*, p 207)

Act, or which would justify the court in refusing, suspending, or qualifying an order for his discharge

(2) To make such other reports concerning the conduct of the debtor as the Board of Trade may direct

(3) To take such part as may be directed by the Board of Trade in the public examination of the debtor

(4) To take such part, and give such assistance, in relation to the prosecution of any fraudulent debtor as the Board of Trade may direct (B A , 1883, s 69)

As to the circumstances which justify the court in refusing a discharge, see B A 1890, s 8, and see *Discharge of Bankrupt*, p 126

(iii) **Duties as regards the estate** As regards the estate of a debtor, it is the duty of the official receiver —

(a) Pending the appointment of a trustee, to act as interim receiver of the debtor's estate, and, where a special manager is not appointed, as manager thereof

(b) To authorise the special manager to raise money or make advances for the purposes of the estate in any case where, in the interests of the creditors, it appears necessary so to do

(c) To summon and preside at the first meeting of creditors

(d) To issue forms of proxy for use at the meetings of creditors

(e) To report to the creditors as to any proposal which the debtor may have made with respect to the mode of liquidating his affairs

(f) To advertise the receiving order, the date of the creditors' first meeting and of the debtor's public examination, and such other matters as it may be necessary to advertise

(g) To act as trustee during any vacancy in the office of trustee (B A , 1883, s 70 (1))

By virtue of s s (a), *supra*, the duties of trustee will devolve upon the official receiver in the interval between the making of a receiving order and the trustee's appointment. The court also has power to direct the official receiver to act for the protection of the estate between the presentation of a petition and the date of the receiving order (see B A , 1883, s 10 (1)) When acting as interim receiver, the official receiver should not realise, deal with, or encumber the estate, except for the purpose of protecting or preserving the property (*In re Wells and Croft, Ex p O R* , 1895,

OFFICIAL RECEIVERS (*cont*), (*index*, p 207)

2 Mans 41) A creditor may, in certain circumstances, call on the official receiver for lists of creditors and copies of accounts (see B A , 1890, s s 16, 17 , and see *Accounts of Trustee*, p 4)

For the purpose of his duties as interim receiver or manager, the official receiver has the same powers as if he were a receiver and manager appointed by the High Court , but he must, as far as practicable, consult the wishes of the creditors with respect to the management of the debtor's property, and may for that purpose, if he thinks it advisable, summon meetings of the persons claiming to be creditors, and must not, unless the Board of Trade otherwise order, incur any expense beyond such as is requisite for the protection of the debtor's property or the disposing of perishable goods provided that when the debtor cannot himself prepare a proper statement of affairs, the official receiver may, subject to any prescribed conditions, and at the expense of the estate, employ some person or persons to assist in the preparation of the statement of affairs (s 70 (2))

Every official receiver must account to the Board of Trade and pay over all moneys and deal with all securities in such manner as the Board from time to time direct (*ib* , (4))

(2) STAFF OF THE BOARD OF TRADE The Board of Trade may from time to time, with the approval of the Treasury, appoint such additional officers, including official receivers, clerks, and servants (if any) as may be required by the Board for the execution of the Bankruptcy Act, and may dismiss any person so appointed (B A , 1883, s 71)

All bankruptcy officers must make returns from which the Board of Trade prepares books for public information and research (B A , 1883, s 130)

ONEROUS COVENANTS (See Disclaimer)

ONEROUS PROPERTY (See Disclaimer)

ONUS OF PROOF.

Where a debtor is charged with having made a fraudulent preference, the onus of proof is on the trustee (*In re Laurie*, 1898, 5 Man 49 , and see *Fraudulent Preference*) The onus of proving the want of notice of an act of bankruptcy lies on a person who has

ONUS OF PROOF (*cont*)

had dealings with the bankrupt, and who desires to rely on the absence of notice (see *Protected Transactions*, p. 255)

OPEN COURT

The following matters are heard in open court Public examination, applications to approve compositions and schemes of arrangement, for orders of discharge and certificates of removal of disqualifications, to set aside settlements, etc, to declare for or against the title of the trustee to any property, for committal for contempt, for trial by jury, appeals from B T to High Court, and appeals against the rejection of a proof or application to expunge or reduce a proof where the amount in dispute exceeds £200 (R 6)

ORDER AND DISPOSITION (and see *Reputed Ownership*)

Generally These words have a peculiar and important meaning under the law of bankruptcy Questions often arise as to what property in the possession of a bankrupt is divisible amongst his creditors It is obvious that if it were possible to allow a man to have the possession and use of goods until he became bankrupt, false credit might easily be established Hence, B A, 1883, s 44, provides that goods in the "order and disposition" of a man at the commencement of his bankruptcy shall, subject to certain conditions, pass to the trustee (see further, *Reputed Ownership*)

Effect of, on goods included in a bill of sale With regard to goods included in a bill of sale, if the bill is duly registered, the chattels comprised in it are not in the possession, order and disposition of the grantor (B of S Act, 1878, s 20) That section, however, only applies to absolute bills, being repealed as to bills given by way of security (B of S Act, 1882, s 15, *Swift v Pannell*, 1883, 24 Ch D 210), (And see *Bills of Sale*)

ORDER OF ADJUDICATION. (See *Adjudication*.)

As to the meaning of this phrase in s 42 (2), see *Landlord and Tenant*, p 186

ORDINARY RESOLUTION (See *Interpretation of Terms*, p 182)**OVERSEER OF THE POOR.** (See *Disqualifications of Bankrupt*.)

PARLIAMENT (and see Disqualifications of Bankrupt).

Rules made under the Bankruptcy Acts (s 127), and accounts of expenditure (s 130), must be laid before Parliament. The Board of Trade must make an annual report to Parliament on all judicial and financial matters (s 131)

If a person having privilege of Parliament commits an act of bankruptcy, he may be dealt with under the Bankruptcy Acts in like manner as if he had not such privilege (1883, s 124)

PARTNERS AND JOINT DEBTORS

- (a) *Bankruptcy dissolves partnership*
Effect of bankruptcy on limited partnership
- (b) *Actions by trustee and bankrupt's partners*, p 214
- (c) *Petition against one partner*
- (d) *Property of partners to be vested in same trustee*
- (e) *Joint and separate debts* (i) *General rule*, (ii) *Exceptions*,
 (iii) *Partners having separate trades*, p 215
- (f) *Voting and proof of creditor of firm*
- (g) *Petition against firm*
- (h) *Debtor's petition by firm*
- (i) *Receiving order against firm*
- (j) *Statement of affairs by firm*, 216
- (k) *Where bankrupt is joint contractor*
- (l) *Proceedings in partnership name*
- (m) *Proceedings by or against firm*
- (n) *Cross references*

(a) *Bankruptcy dissolves partnership* The Partnership Act, 1890, s 33, provides that, subject to any agreement between partners, every partnership is dissolved as regards all the partners by the bankruptcy of one

Effect of bankruptcy on limited partnership The rule that bankruptcy dissolves a partnership does not apply to a limited partnership within the meaning of the Limited Partnerships Act, 1907. By s 4 (2) of that Act a limited partnership consists of one or more persons, called general partners, who are liable for all debts, and obligations of the firm, and one or more persons, called limited partners, who are not liable for the debts or obligations of the firm beyond the amount which they contribute. S 6 (2) of the Act

PARTNERS AND JOINT DEBTORS (*cont*), (*index*, p 213)

provides that a limited partnership shall not be dissolved by the bankruptcy of a limited partner

(b) **Actions by trustee and bankrupt's partners** Where a member of a partnership is adjudged bankrupt, the court may authorise the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt's partner, and any release by such partner of the debt or demand to which the action relates shall be void, but notice of the application for authority to commence the action shall be given to him, and he may show cause against it, and on his application the court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and if he does not claim any benefit therefrom, he shall be indemnified against costs in respect thereof as the court directs (B A, 1883, s 113)

(c) **Petition against one partner**: Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present a petition against any one or more partners of the firm without including the others (B A 1883, s 100)

(d) **Property of partners to be vested in same trustee** Where a receiving order has been made on a bankruptcy petition against or by one member of a partnership, any other bankruptcy petition against or by a member of the same partnership must be filed in or transferred to the court in which the first-mentioned petition is in course of prosecution, and, unless the court otherwise directs, the same trustee or receiver must be appointed as may have been appointed in respect of the property of the first-mentioned member of the partnership, and the court may give such directions for consolidating the proceedings under the petitions as it thinks just (B A, 1883, s 112).

(e) **Joint and separate debts** —

(1) **General rule** The joint partnership estate is first applicable to the payment of joint debts, and the separate estate to the payment of separate debts. A surplus of the separate estates is applied as part of the joint estate. A surplus of the joint estate is dealt with as part of the respective separate estates in proportion to the rights and interests of each partner (B A, 1883, s 40, s s 3-6)

PARTNERS AND JOINT DEBTORS (*cont*), (*index*, p 213)

(ii) **Exceptions to the above rule** · If there is no joint estate and no solvent partner, joint creditors are treated on an equal footing with separate creditors (*In re Carpenters*, 1890, 7 Mor 270) If a joint creditor (i.e., a creditor of the firm) is petitioning creditor in a separate adjudication, he may have dividends out of the separate estate (*Ex p Ackerman*, 1808, 14 Ves 604) Where one partner has fraudulently appropriated joint property, the firm's creditors may prove against his separate estate in competition with his separate creditors (*Ex p Sillitoe*, 1824, 1 Gl & J 374) As to proof by a retired partner, see *Ex p Andrews*, 1884, 25 Ch D 505

(iii) **Partners having separate trades** Where a member of a firm carries on a separate trade, the firm may prove against his estate, provided the debt arose in the ordinary course of business between trade and trade (*Ex p Maude*, 1867, L R 2 Ch 550)

(f) **Voting and proof of creditor of firm** A firm creditor may prove his debt in the bankruptcy of a partner of the firm, for the purpose of voting at any creditors' meeting, and may vote, but he cannot receive a dividend out of the separate estate until all the separate creditors are paid in full (B A, 1883, Sch I R 13)

(g) **Petition against firm** Where a creditor's debt against the firm is sufficient to found a petition, he may petition against any one or more partners without including the others (s 110), and where there are more than one respondents to a petition, it may be dismissed against one or more, without prejudice to the others (s 111)

(h) **Debtor's petition by firm** Where a firm of debtors file a declaration of inability to pay their debts or bankruptcy petition, it must contain the names in full of the individual partners, and if such declaration or petition is signed in the firm's name, the declaration or petition must be accompanied by an affidavit made by the partner who signs it, showing that all the partners concur in the filing of it (R 261)

(i) **Receiving order against firm** A receiving order made against a firm operates as if it were a receiving order made against each of the persons who at the date of the order is a partner of the firm (R 262) Where a receiving order was made against a firm having an infant partner, the proceedings were amended so as to continue

PARTNERS AND JOINT DEBTORS (*cont.*), (*index*, p 213)

against the firm "other than" the infant (*Lovell and Christmas v Beauchamp*, 1894, A C 607)

(j) **Statement of affairs by firm** In cases of partnership the debtors shall submit a statement of their partnership affairs, and each debtor must submit a statement of his separate affairs (R 263) No order of adjudication can be made against a firm in the firm's name It must be made against the partners individually (R 264)

(k) **Where bankrupt is joint contractor** If a bankrupt is a contractor jointly with any person or persons, such person or persons may sue or be sued in respect of the contract, without the joinder of the bankrupt (B A , 1883, s 114)

(l) **Proceedings in partnership name** Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under this Act in the name of the firm, but in such case the court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner, and verified on oath or otherwise, as the court may direct (B A , 1883, s 115 , see also s 148)

(m) **Proceedings by or against firm** Where any notice, petition, etc., requiring attestation is signed by a firm of creditors or debtors in the firm's name, the partner signing for the firm must add his own signature, e g , "Brown & Co , by James Green, a partner in the said firm" (R 259) A notice or petition may be served on a firm by being served at their principal place of business in England on any one of the partners, or upon any person having at the time of the service the control or management of the business (R 260)

(n) **Cross references** As to the effect of an order of discharge on partners and joint debtors, see *Discharge of Bankrupt*, p 41 , as to issue of bankruptcy notice against firm, see *Bankruptcy Notice*, p 22 , and as to the bankruptcy of a firm having an infant partner, see *Bankrupt*, p 41

PAWNING GOODS

A trader who pawns or pledges goods which he has obtained on credit and has not paid for, may render himself criminally liable (see *Fraudulent Debtors*, p 172) As to whether a pawn or pledge of goods is a bill of sale, see *Bills of Sale*, p 54

PAYMENT IN FULL

As to the meaning of these words, see *Annulment of Adjudication*, p 32.

PEERS (See Parliament, Disqualifications of Bankrupt)

PENSION OF BANKRUPT (See Realisation of Property, p 259)

PERIODICAL PAYMENTS. (See Proof of Debts, p 240)

PERISHABLE PROPERTY

The official receiver, when acting as interim receiver and manager, may sell perishable property (see *Official Receiver*, p 210)

PERSONAL CHATTELS

As to the meaning of personal chattels within the Bills of Sale Acts, see *Bills of Sale*, p 53

PERSONAL EARNINGS

As to how far the personal earnings of a bankrupt may be devoted to the payment of his creditors, see *Property Divisible amongst Creditors*, p 244

PETITION

(i) **GENERALLY**

(ii) **PETITIONING CREDITORS**, p 218, *et seq* *Who may petition, Assignees of debt, Who may not petition*

(iii) **CONDITIONS ON WHICH A CREDITOR MAY PETITION**, p 219, *et seq*

(a) *Provisions of s 6 "Liquidated sum", "Payable immediately or at some certain future time", "Three months", "Domiciled in England, etc"*

(b) *Petition of secured creditor* (see *Secured Creditor*)

(iv) **CREDITOR'S PETITION AND ORDER THEREON**, p 221, *et seq*

(1) *Affidavit*

(2) *Proof of and consideration for debt*

(3) *Power to dismiss petition*, p 222

(4) *Stay of petition*, p 223

(5) *Trial of question relating to the debt*

(6) *Petition of another creditor*

(7) *Leave to withdraw petition*, p 224

(8) *Malicious presentation of a petition*

PETITION (*cont*).

- (9) *Miscellaneous powers of court as to petition*, p 224, *et seq.*
 - (a) *Consolidation*
 - (b) *Substitution of another petitioner*
 - (c) *Death of debtor*
 - (d) *Stay of proceedings*
 - (e) *Partners*
 - (f) *Adjournment of petition*
 - (g) *Power to dismiss petition against some respondents only*, p 225
 - (h) *Form of creditor's petition*
 - (i) *Affidavits of truth of statements in petition*
 - (j) *Form of notice to oppose petition*
- (v) DEBTOR'S PETITION AND ORDER THEREON, p 227 (1)
 - Generally* (2) *Form of*
- (vi) SUMMARY OF RULES AS TO PETITIONS p 227
 - (a) *Generally*
 - (b) *Creditor's petition*
 - (c) *Service*
 - (d) *Hearing of a petition*
 - (e) *Non-appearance of debtor*
 - (f) *Non-appearance of creditor*
 - (g) *Adjournment of hearing*
- (vii) CROSS REFERENCES, p 230

(i) **GENERALLY** Upon hearing a bankruptcy petition, whether presented by a creditor or by the debtor, the court may make a receiving order for the protection of the estate (B A, 1883, s 5)

(ii) PETITIONING CREDITORS

Who may petition Speaking generally, any person who is entitled to take proceedings to recover a debt at law or in equity may present a petition. A company or corporate body may do so in the corporate name even against one of its shareholders (*Lindley on Companies*, 5th Ed, pp '559, 560), and a liquidator may present a petition in the name of the company (*In re Bassett, Ex p Lewis*, 1896, 1 Q B 219)

The following persons may petition. Joint creditors, provided all sign (*Brickland v Newsome*, 1808, 1 Taunt 477), an infant by

PETITION (*cont.*), (*under*, p 217)

his next friend (*Ex p Brocklebank*, 1877, 6 Ch D 358), an executor who has obtained probate (*Rogers v James*, 1816, 2 Marsh, 425) a trustee in bankruptcy, having regard to the B A, 1883, s 57 (2) (*Ex p Harper*, 22 Q B D 85, an alien, if he can sue for the debt, a member of the Stock Exchange who has come in and received dividends under an administration by the official assignee (*Ex p Mendelssohn*, 1903, 1 K B 216)

A petition will not necessarily be dismissed because the petitioner is the one and only creditor of the bankrupt (*In re Hecquard*, 1889, 24 Q B D 71)

Assignees of debts An assignee who has obtained an absolute assignment by writing which is valid under the Judicature Act 1873, s 25 (6), may also present a petition. Such an assignment cannot be impeached, although its avowed object is to enable the assignee to institute bankruptcy proceedings (*Fitzroy v Cave*, 1905, 21 T L R) (As to what constitutes an assignment, see *National Provincial Bank v Harle*, 1881, 6 Q B 626, *Comfort v Betts*, 1891, 1 Q B 737, and *Hughes v Pump House Hotel Co, Ltd*, 1902, 2 K B 190, and cases there cited)

Who may not petition It has been held that the following persons, etc., cannot present a petition. A husband in respect of a debt due to his wife as administratrix (*Ex p Scaples*, 7 Vin 67), a creditor, if the act of bankruptcy on which he relies is one to which he has himself been privy (*Ex p Payne*, 1847, De Gex, 534) (As to whether a receiver can petition, see *In re Sacker*, 1888, 22 Q B D 179, *In re Macoun*, 1904, 2 K B 700) So a creditor who has been party to a deed of assignment for the benefit of creditors generally could not found a petition upon that deed as an act of bankruptcy (*ib.*) (See *Deed of Assignment*)

(iii) CONDITIONS ON WHICH A CREDITOR MAY PETITION —

Provisions of s 6. A creditor may not present a petition unless —

(a) *Amount of debt* The debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition the aggregate amount of debts owing to the several petitioning creditors, amounts to fifty pounds, and

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(b) *Debt to be liquidated* The debt is a liquidated sum, payable either immediately or at some future time, and

(c) *Date of act of bankruptcy* The act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition, and

(d) *Domicile of debtor* The debtor is domiciled in England, or, within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in England (B A, 1883, s 6 (1))

“Liquidated sum” It was always held (see *Ex p Charles*, 1811, 14 East 197) that a bankruptcy petition could only be founded on a liquidated sum, and this is now expressly enacted. Liquidated means a sum certain. A petition could not, for instance, be founded on a mere claim for damages. The following have been held not to be good petitioner’s debts. A sum assessed by a jury as damages against a co-respondent, and ordered to be paid to the husband instead of into the registry (*Ex p Muirhead*, 1876, 2 Ch D 22), a debt barred by the statute of limitations (*Ex p Tynle*, 15 Ch D 125), or founded on an illegal consideration (*Wells v Girling*, 1819, 4 Moo 78)

“Payable immediately or at some certain future time” Any person who has given credit to a trader upon a valuable consideration for any sum payable at a certain future time, may petition whether the time for payment has arrived or not. Thus a petition may be founded on a bill not due (*In re Barr, Ex p Wolfe*, 1896, 1 Q B 616, *In re Raatz*, 1897, 2 Q B 80), but see *In re a Debtor*, 1908, 1 K B 344. It must, however, have existed at the time of the act of bankruptcy relied on (*Moss v Smith*, 1808, 1 Camp 489)

“Three months” In calculating the period of three months, the day on which the petition is presented must be excluded (*In re Hanson, Ex p Forster*, 1887, 4 Mor 98)

“Domiciled in England, etc.” A debtor who for eighteen months prior to a petition had a room in a London hotel, was held to “ordinarily reside in England” (*In re Norris, Ex p Reynolds*, 1888, 5 Mor 111), and a Frenchman who took a flat in London for three months was held to have a dwelling house in England (*In re*

PETITION (*cont*), (*index*, p 217)

Hecquard, 1889, 24 Q B D 71) (As to foreigners, see *Bankrupt*, p 45 *Foreigners*)

• Petition of secured creditor (See *Secured Creditor*, p 289)

(iv) CREDITOR'S PETITION, AND ORDER THEREON —

(1) *Affidavit* A creditor's petition must be verified by affidavit of the creditor, or of some person on his behalf (B A, 1883, s 7 (1))

(2) *Proof of debt, etc* At the hearing the court requires proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition (*ib s s* (2))

"*Proof and consideration for debt*" The petitioning creditor must be prepared to show that the debt existed at the date and during the hearing of the petition, and down to the date of the receiving order For this purpose he may call the debtor himself as a witness, and may insist on the production of the debtor's books The debtor may try to avoid a receiving order by tendering his debt at the eleventh hour, after the date of the petition While the creditor would be justified in refusing payment, it is possible that the court would refuse to make a receiving order if the debtor tendered debt and costs, the petition may be dismissed if the debtor shows that he can pay his debts

The Court of Bankruptcy has power to enquire into the consideration for every debt upon which a petition is founded, and thus although it may be a judgment debt In *Ex p Lennox*, 1885, 16 Q B D 315, at p 323, Lord Esher said "Although by consenting to a judgment the debtor is estopped everywhere else from saying that there is no debt due—although the judgment is binding on him by reason of his consent, and of its being the judgment of the court—yet no such estoppel is effectual as against the Court of Bankruptcy The court has a right to inquire into the debt" It follows—to take an extreme case—that a County Court judge exercising his bankruptcy jurisdiction could say that a judgment debt founded upon a decision of the House of Lords is not good subject matter for a petition So, if a judgment obtained by

PETITION (*cont.*), (*under*, p 217)

compromise appears to be unfair and unreasonable, the debt may not be treated as a good petitioner's debt (*In re Hawkins, Ex p Troup*, 1895, 1 Q B 404) In practice, however, the validity of a judgment debt will only be enquired into where there is some suggestion of fraud or collusion (*In re Flatau, Ex p Scotch Whiskey Distillers Co*, 1888, 22 Q B D 83, and see *Beauchamp v Beauchamp*, 1904, 1 K B 572) A good illustration is afforded by a case in which the court held that a judgment debt obtained by a moneylender was harsh and unconscionable (*In re a Debtor*, 1903, 1 K B 705)

(3) Power to dismiss petition If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition (s 7 (3))

"Sufficient cause" for dismissing a petition While it is sufficient cause for dismissing a petition that an adjudication would destroy the only asset (*In re Otway*, 1895, 1 Q B 812), the fact that the order will have this effect does not prevent the court making it (*In re Leonard*, 1896, 1 Q B 473) The fact that there is only one creditor and no assets is not sufficient cause (*In re Hecquard*, 1889, 24 Q B D 71) But where it is impossible that there can be any assets (*In re Betts*, 1897, 1 Q B 50), the court will dismiss the petition Where the debtor has executed a deed of assignment for the benefit of his creditors, the fact that he has done so is no ground for dismissing the petition of a dissentient creditor (*Ex p Oram, In re Watson* 1885, 15 Q B D 399) The court, however, seems to require *bona fides* on the part of the petitioning creditor So, where a petitioning creditor had endeavoured to obtain a secret advantage over the other creditors with a threat, if the debtor did not concede it, to present a petition, there was held to be sufficient cause for refusing a receiving order (*In re Goldberg*, 1905, 21 T L R 139)

Where petition presented for ulterior motive Where a petition is presented for the sole purpose of extorting money, it may be dismissed (*In re Atkinson*, 1892, 9 Mor 193, *In re Otway*, 1895, 1 Q B 812) In the absence of fraud, however, the mere fact that a creditor has an ulterior motive, however reprehensible, is no ground for dismissing a petition So where a man desued to make his

PETITION (*cont*), (*index*, p 217)

partner a bankrupt with a view to ending the partnership, this was held to be no ground for dismissing a petition (*King v Henderson*, 1898, A C 720) A creditor whose debt is insufficient, *i.e.*, less than £50, may even buy in another debt in order to be able to present a petition (*In re Baker*, 1887, 5 Mor 5, as to extortion, see *In re Bebro*, 1900, 2 Q B 316, *In re Larard*, *Ex p Yeomans*, 1896, 3 Mans 317)

(4) Stay of petition When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure, or compound for a judgment debt, the court may stay or dismiss the petition on the ground that an appeal is pending from the judgment (s 7 (4))

Stay of petition under s s (4) It is obvious that where a petition is founded on a judgment debt, the reversal of the judgment would involve the debt being set aside No security is required from the debtor, but the court has an absolute discretion as to granting the stay In a *bonâ fide* case the petition will be stayed generally, the creditor having liberty to apply if the debtor's appeal fails (*Ex p Heyworth*, *In re Rhodes*, 1884, 14 Q B D 49)

(5) Trial of question relating to the debt Where the debtor appears and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify a petition against him, the court, on such security (if any) being given as the court may require for payment to the petitioner of any debt which may be established against him in due course of law, and of the costs of establishing the debt, may instead of dismissing the petition stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt (s 7 (5))

Stay under s s (5) Where the debtor alleges that the debt of the petitioning creditor is not valid, and wishes to have the question tried, he must in general give security That security will generally be limited to the amount of the debt, but may be for a very much greater amount (*Ex p Evans*, 1884, 50 L T 158)

(6) Petition of another creditor Where proceedings are stayed, the court may, if by reason of the delay caused by the stay of proceedings, or for any other cause it thinks just, make a receiving order on the petition of some other creditor, and shall thereupon

PETITION (*cont*), (*index*, p 217)

dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed as aforesaid (s 7 (6))

(7) *Leave to withdraw petition* A creditor's petition shall not, after presentment, be withdrawn without the leave of the court* (B A , 1883, s 7 (7))

(8) *Malicious presentation of a petition* It would seem that an action may be brought for the malicious presentation of a bankruptcy petition This subject is hardly within the scope of the present work The reader should consult *Williams*, pp 249-51 for the cases on the subject

(9) *Miscellaneous powers of court as to petitions* .—

(a) *Consolidation* Where two or more petitions are presented against the same debtor or against joint debtors, the court may consolidate the proceedings, or any of them, on such terms as the court thinks fit (s 106)

(b) *Substitution of another petitioner* Where a petitioner does not proceed with due diligence on his petition, the court may substitute as petitioner any other creditor to whom the debtor may be indebted in the required amount, *ie* , £50 (s 107)

If a petition has been dismissed, and more than three months have elapsed since the act of bankruptcy, no order can be made under section 7 (*In re Maugham*, 1888, 21 Q B D 21) All notices, services, etc , must be repeated if the petitioning creditor is changed (*In re Bristow*, 1868, L R 3 Ch 247)

(c) *Death of debtor* If a debtor by or against whom a bankruptcy petition has been presented dies, the proceedings in the matter shall, unless the court otherwise orders, be continued as if he were alive (s 108) (See, as to this section, *In re Walker*, 1886, 3 Mor 69 , *In re Hardy*, *Hardy v Farmer*, 1896, 1 Ch 904)

(d) *Stay of proceedings* The court may at any time, for sufficient reason, make an order staying the proceedings under a petition, either altogether or for a limited time, on such terms and subject to such conditions as may be just (s 109)

(e) *Partners* (As for partners, see *Partners and Joint Debtors*)

(f) *Adjournment of petition* Under the general powers of adjournment given by the B A , 1883, s 105 (2), the court may order an adjournment of a petition on such terms as it thinks fit

PETITION (*cont*), (*under*, p 217)

But it is not ground for adjournment that the debtor has made an assignment for the benefit of his creditors, and that it is desirable to see whether the arrangement will work well (*Ex p Oram, In re Watson*, 1885, 15 Q B D 399)

(g) *Power to dismiss petition against some respondents only*
Where there are more respondents than one to a petition, the court may dismiss the petition as to one or more of them, without prejudice to the effect of the petition as against the other or others of them (B A, 1883, s 111)

(h) *Form of creditor's petition* (No 10)

I, C D, of [or we, C D, of and E F, of] hereby petition the Court that a receiving order may be made in respect of the estate of [insert name of debtor] of [insert present address and description of debtor] and lately carrying on business at [or residing at] [insert address or addresses at which the debtor has lately resided or carried on business] and say —

1 That the said A B has for the greater part of six months next preceding the presentation of this petition resided [or carried on business] at within the district of this Court [or, as the case may be, following the terms of section 95]

2 That the said A B is justly and truly indebted to me [or us] in the aggregate in the sum of £ [set out amount of debt or debts, and the consideration]

3 That I [or we] do not, nor does any person on my [or our] behalf hold any security on the said debtor's estate, or on any part thereof, for the payment of the said sum

Or,

That I hold security for the payment of [or part of] the said sum [but that I will give up such security for the benefit of the creditors of A B in the event of his being adjudged bankrupt [or and I estimate the value of such security at the sum of £]]

Or,

That I, C D, one of your petitioners, hold security for the payment of, etc

That I, E F, another of your petitioners, hold security for the payment of, etc

4 That A B within three months before the date of the presentation of this petition has committed the following act [or acts] of bankruptcy, namely [here set out the nature and date or dates of the act or acts of bankruptcy relied on]

Dated this day of 188

(Signed) C D
E F

[Signed by the petitioner in
my presence]

Signature of witness

Address

Description

NOTE —The address at which the debtor was residing or carrying on business when the petitioning creditor's debt was incurred should in all cases appear in the petition

PETITION (*cont.*), (*index* p 217)

NOTE—If there be more than one petitioner and they do not sign together the signature of each must be separately attested, e.g. "Signed by the petitioner *E F* in my presence" If the petition be signed by a firm the partner signing should add also his own signature e.g. "*I S & Co* by *J S*, a partner in the said firm" If the debtor resides at any place other than the place where he carries on business both addresses should be inserted

Indorsement

This petition having been presented to the Court on the
day of _____ 188__ it is ordered that this petition shall be heard
at _____ on the _____ day of _____ 188__, at
o'clock in the _____ noon

And you the said *I B* are to take notice that if you intend to dispute the truth of any of the statements contained in the petition you must file with the registrar of this Court a notice showing the grounds upon which you intend to dispute the same and send by post a copy of the notice to the petitioner [three] days before the date fixed for the hearing

*(1) Affidavit of truth of statements in petition (No 12)**(Title)*

I the petitioner named in the petition hereunto annexed, make oath [if the petitioner declare or affirm, after the form accordingly] and say —

1 That the several statements in the said petition are within my own knowledge true

Sworn at, etc

C D

NOTE—If the petitioner cannot depose that the truth of all the several statements in the petition is within his own knowledge, he must set forth the statements the truth of which he can depose to and file a further affidavit by some person or persons who can depose to the truth of the remaining statements

*Affidavit of truth of statements in joint petition (No 13)**(Title)*

We, *C D E I, G H* etc the petitioners named in the petition hereunto annexed, severally make oath and say —

And first I the said *C D* for myself say —

1 That *I B* is justly and truly indebted to me in the sum of pounds, as stated in the said before-mentioned petition

2 That the said *I B* committed the act [or acts] of bankruptcy stated to have been committed by him in the said before-mentioned petition

3 That *A B* has for the greater part of the past six months resided (or carried on business) at

And I the said *E I* for myself say —

4 That *I B* is justly and truly indebted to me in the sum of pounds as stated in the said before-mentioned petition

And I the said *G H* for myself say —

5 That *A B* is, etc

C D
E I
G H

Sworn by the deponents *C D, E I,*
and *G H, &c*

See note to last Form

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(k) Notice by debtor of intention to oppose petition (No 17)

(Title)

In the matter of a bankruptcy petition presented against me on the
 day of 18 by C D of
 [or and E F of G H of etc]

I, the above A B, do hereby give you notice that I intend to oppose the making of a receiving order as prayed, and that I intend to dispute the petitioning creditor's debt [or the act of bankruptcy, or as the case may be]

Dated this day of 188
 To C D, of , and to A B and to the registrar of the said Court

(v) DEBTOR'S PETITION AND ORDER THEREON —

(1) Generally A debtor's petition shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the court must thereupon make a receiving order (B A, 1883, s 8)

Withdrawal A debtor's petition cannot, after presentment, be withdrawn without the leave of the court (B A 1883, s 8)

The presentation of a petition by a debtor is an act of bankruptcy (s 4 (1) (f))

(2) Form of debtor's petition (No 4)

I, [insert name, address, and description of debtor] lately residing at [and carrying on business at [insert the other address or addresses at which unsatisfied debts or liabilities may have been incurred] having for the greater part of the past six months resided at [and carried on business at] within the district of the Court [or, as the case may be, following the terms of section 95] and being unable to pay my debts, hereby petition the Court that a receiving order be made in respect of my estate [and that I may be adjudged bankrupt]

Dated the day of 188
 (Signature)

Signed by the debtor in my presence

Signature of witness

Address

Description

Filed the day of 188

NOTE —Where the debtor resides at a place other than his place of business, both addresses should be inserted

(vi) SUMMARY OF RULES AS TO PETITIONS —

(a) Generally Rs 143-169 make elaborate provision for bankruptcy petitions Rs 143-147, which relate to petitions generally, may be thus epitomised A bankrupt's petition shall be in Form No 4 in the appendix to the Bankruptcy Rules, while

PETITION (*cont*) (*infra*, p. 217)

a creditor's petition is to be in Form No. 10. The document may be written or printed but must not be altered or interlined without the leave of the registrar. It must be attested in England by a solicitor, justice of the peace, official receiver, or registrar of the court (or it may be signed by the petitioner's duly constituted attorney *Ex p Wallace* 1884 14 Q B D 22). Out of England it must be attested by a judge, magistrate or notary public. In general, the petition must give the business address of the debtor, and if he has recently changed his address as "lately of" etc. If presented in the County Court it must in general be presented in the County Court where the debtor carries on business. The petitioning creditor must deposit £5 and such further sum as may be necessary to cover the fees and expenses of the official receiver. He may however get back all or some part of the £5 if the assets are sufficient (see R 147 (2)). The petition should give the date of the act of bankruptcy (*In re Dunhill* 1894, 2 Q B 231).

(b) **Creditor's Petition.** Rs 148-156A make special provision for creditor's petitions. The petitioning creditor may have to give security for costs to the debtor, as where, for instance, he is resident abroad. The petition must be verified by affidavit, made either by the creditor himself or if he does not know the facts by any person who does. The registrar must investigate the statements in the petition before copies of it are sealed for service. If some of the statements cannot be verified by affidavit, witnesses may be summoned to prove the same.

(c) **Service.** With regard to service a sealed copy of the petition must be personally served upon the debtor by an officer of the court or by the creditor or some one employed by him. If personal service cannot be effected an order for substituted service may be obtained, and where the debtor petitioned against is not in England the court makes an order as to how the service shall be effected. The person serving need not be in the permanent employ of the creditor or his solicitor, provided he is duly authorised to effect the service (*In re Blackman, Ex p Branfill*, 1892 9 Mor 157). Publication of a notice in the *Gazette* and the *Times* has been held sufficient (*re Collinson*, 1887, 4 Mor 161). Where a debtor petitioned against is not in England, the court may order service to be made within such time and in such form and manner as it

PETITION (*cont*), (*index*, p 217)

thinks fit (R 156) Note, however, that the debtor must be amenable to English bankruptcy law So, service of a bankruptcy notice cannot be ordered on a foreigner resident out of the jurisdiction (*In re Pearson*, 1892, 2 Q B 263)

If the debtor dies before service, the petition may, by order of court, be served on his personal representative (R 156A)

(d) Hearing of Petition (Rs 157-169) A receiving order will be made forthwith on a debtor's petition, but a creditor's petition will not be heard until the expiration of eight days after service, subject to an exception in the case where a debtor has filed a declaration of inability to pay his debts, or is about to abscond (R 157 (2))

The registrar appoints the time and place of hearing, notice being served on all the respondents if there are more than one A debtor who disputes the petition should file a notice with the registrar, specifying the statements which he desires to deny or dispute (R 160), but the want of such a notice will not prevent the debtor disputing the statements in the petition at the hearing, subject probably, to his having to pay the costs occasioned by his neglect (*Ex p Dale*, 1876, 3 Ch D 322)

(e) Non-appearance of debtor If the debtor does not appear, the court may make a receiving order on such proof of the statements in the petition as appears to be sufficient (R 161) A mere affidavit verifying the petition is not sufficient

(f) Non-appearance of creditor Unless his attendance is dispensed with (by leave of the court under R 164), the petitioning creditor must appear and submit to cross-examination if required by the debtor (*In re Pinnett*, 1895, 2 Mans 403) If the creditor neglects to appear, he cannot present a petition founded on the same act of bankruptcy without the leave of the court (R 163)

(g) Adjournment of hearing If the debtor appears, and there is a dispute as to the contents of the petition, and it is desired to adduce further evidence on either side, the court may adjourn the hearing (R 162) Subject to this, after the expiration of one month from the day appointed for the first hearing of a petition, no further adjournment shall be allowed merely by consent of the parties, except for some other sufficient reason stated in the order of the court (R 169) It was held in *In re Farleigh* (1905, 21 T L

PETITION (*cont*) (*index*, p 217)

R 198) that the registrar was wrong in refusing an adjournment where the debtor made an offer which the petitioning creditor's solicitor was unable to accept without communicating with his principals

(vii) **CROSS REFERENCES** As to debtor's petition by firm see *Partners and Joint Debtors*, p 215, and as to petition against a partnership firm, see, *ib*, p 216

PETITIONER. (See *Petition*)

PIECEWORK

Wages due to a labourer for piecework are preferential debts (see *Priority of Debts* p 232)

PLEDGE

An ordinary pledge of personal chattels is not a bill of sale (see *Bills of Sale*, p 54)

PLEDGED PROPERTY (See *Mortgaged Property*)

POLICY OF INSURANCE.

A policy of insurance is a chose in action (*L v Ibbetson*, 1878 8 Ch D 519) A debtor cannot be compelled to submit to medical examination in order to enable the trustee to insure his life (*B v Black*, 1888 13 A C 570)

POSSESSION

As to the meaning of the term "possession" as used in the reputed ownership clause, see *Reputed Ownership*, p 271

POST (See *Notice*.)

POWER OF ATTORNEY.

A bill of sale may be executed under a power of attorney (see *Bills of Sale*, p 52) A power of attorney may itself in certain cases, be a bill of sale (see *ib*, p 54)

PREFERENCE. (See *Fraudulent Preference*)

PREFERENTIAL DEBTS (See *Priority of Debts*)

PRESSURE

The fact that a debtor makes a payment under pressure i.e., in pursuance of a precedent contract, or in apprehension of legal proceedings, may have effect to prevent the payment being treated as a fraudulent preference (see *Fraudulent Preference*, p 176)

PRIORITY OF DEBTS.

- (a) *Generally*
- (b) *Preferential payments in Bankruptcy Act, 1888, (i) Rates and taxes, (ii) Salaries of clerks, etc, (iii) Wages of workmen, etc*
- (c) *Claims under Workmen's Compensation Act, p 233*
- (d) *Time of paying preferred debts*
- (e) *Debts of officer of friendly society*
- (f) *Preferential claim of apprentice or articled clerk, p 234*
- (g) *Deferred debts Money lent by wife to husband*
- (h) *Joint and separate estate of partners (see Partners and Joint Debtors)*
- (i) *Under administration order*

(a) *Generally* Subject to the provisions of the Bankruptcy Act, 1883, and certain amending Acts, all debts proved in bankruptcy are paid *pari passu* (B A, 1883, s 40 (4)) If there is any surplus after payment of debts, that surplus is applied in payment of interest from the date of the receiving order at the rate of £4 per cent on all debts proved in the bankruptcy (ib, s s (5)) The final surplus goes to the bankrupt

To the rule that each creditor is entitled to equal treatment there are certain exceptions, framed either in the interest of the state or of the individual Thus, the inland revenue and local authorities are given preference in respect of taxes, workmen and clerks are given an advantage over other creditors in respect of wages earned, while the debtor's landlord is entitled to a certain degree of preference in respect of arrears of rent As to the entry of preferential debts in the statement of affairs, see *Statement of Affairs*, p 304

(b) *Preferential payments in Bankruptcy Act, 1888* By s s 1 & 2 of this Act certain debts must be paid in priority to others These preferential debts are set out below in italics, and explanatory notes are added in ordinary type

(i) *Rates and taxes All parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax assessed on the*

PRIORITY OF DEBTS (*cont.*), (*infra*, p. 231)

bankrupt up to the fifth day of April next before the date of the receiving order and not exceeding in the whole one year's assessment

It has been held that the court will not go behind an assessment to income tax in order to determine what amount is provable (*In re Calvert*, 1899, 2 Q. B. 145)

(ii) *Salaries of clerks, etc.* All wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order

Under the older Bankruptcy Act, it was held that in order to make a man the clerk or servant of the bankrupt, there must be something more than occasional employment. Thus, a music master and a drill sergeant giving lessons by the hour at a school were not clerks, servants, or labourers (*Ex p. Walker*, *In re Heath*, L. R. 15 Eq. 412). So a public singer (*Ex p. Harcourt*, 1858, 31 L. T. O. S. 188), and an accountant occasionally employed (*Ex p. Butler*, 1857, 28 L. T. O. S. 375) were held not to be servants. But a commercial traveller paid by annual salary (*Ex p. Neal*, 1829, *Mont and W.* 194), and the mate of a vessel (*Ex p. Homborg* 1842, 2 M. D. & D. 642) were held to be servants. Although it was decided in *Ex p. Simmons* (1858, 30 L. T. O. S. 311), that a clerk or servant must be paid by salary and not by commission, yet it was held in *Ex p. Goodwin*, 1906, 22 T. L. R. 664, in which *Simmons'* case was not referred to, that commission payable to a commercial traveller is part of his salary, and must be paid in priority to the ordinary debts.

(iii) *Wages of workmen, etc.* All wages of any labourer or workman not exceeding £25, whether payable for time or for piecework, in respect of services rendered to the bankrupt during two months before the date of the receiving order, provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the court may decide to be due under the contract, proportionate to the time of service up to the date of the receiving order.

In *Ex p. Allsop*, *In re Disney*, 1875, 32 L. T. 433, Bacon, C. J., said that a miner employed to get a stone for which he was paid by the ton, was a "labourer or workman," although he employed and paid men under him. Again, a foreman employed by the bankrupt, who

PRIORITY OF DEBTS (*cont*), (*index*, p 231)

made bricks at so much a thousand, and was liable to be discharged at a week's notice, was held to be a workman (*In re Field*, 1887, 4 Mor 63) Whether insolvency results in an actual adjudication or not, the bankrupt must pay attention to these priorities, for no composition or scheme can be approved by the court which does not provide for the payment in priority to other debts of all debts directed to be so paid in the distribution of the property of a bankrupt (B A, 1890, s 3 (18))

The debts referred to above rank equally between themselves, and must be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they abate in equal proportions between themselves (Pref Payments in Bankruptcy Act, 1888, s 1 (2))

(c) **Claims under the Workmen's Compensation Act** It is provided by the Workmen's Compensation Act, 1906, s 5 (3), that in the distribution of the property of a bankrupt there shall be paid in priority to all other debts (except those mentioned in s 1 (1) of the Preferential Payments in Bankruptcy Act, 1888) the amount not exceeding in any individual case one hundred pounds, due in respect of any compensation under the Act, the liability whereof accrued before the date of the receiving order Where the compensation is a weekly payment, the amount due in respect thereof must, for the purposes of this provision, be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose in accordance with the provisions of the Act

(d) **Time of paying preferred debts** Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the debts above mentioned must be discharged forthwith, so far as the property of the debtor is sufficient to meet them (Pref Payments in Bankruptcy Act, 1888, s 1 (3))

(e) **Debts of officer of friendly society or savings bank** By the Friendly Societies Act, 1896, s 35, the trustees of a friendly society have, on the bankruptcy or liquidation by arrangement (*sic*) of the affairs of an officer of the society having property or money of the society, a right to receive such property or money in preference to other debts and claims against the estate In such a case it

PRIORITY OF DEBTS (*cont.*) (*index* p 231)

appears that the debt due to or property claimed by the society will have priority over all other debts or claims (even though the money or property cannot be actually traced (*In re Miller* 1893 1 Q B 327 10 Mor 183), except possibly the funeral expenses etc. referred to in s 125 (7) (see p 113 *ante*).

By s. 14 of the Savings Bank Act, 1863 priority is given to debts due from the officers of the society and by s 13 of the Savings Bank Act 1891 it is provided that nothing in s 40 of the B A 1883, shall affect this priority.

(f) **Preferential claim of apprentice or artied clerk.** Where any person is apprenticed or is an artied clerk to the bankrupt, the adjudication shall, if either the bankrupt or apprentice or clerk gives notice in writing to the trustee to that effect, be a complete discharge of the indenture of apprenticeship or articles of agreement and if any money has been paid by the apprentice or clerk to the bankrupt as a fee the trustee may pay such sum as he (subject to an appeal to the court) thinks reasonable out of the bankrupt's property to or for the use of the apprentice or clerk regard being had to the amount paid by him, and to the time during which he served with the bankrupt and to the other circumstances of the case (B A 1883, s 41 (1)).

A trustee may instead of acting under the preceding provisions of the section transfer the indenture of apprenticeship or articles of agreement to some other person (*ib* s s (2)).

(g) **Deferred debts—money lent by wife to husband.** Where money is lent to a man by his wife for the purposes of his business, she is not treated as an ordinary creditor. It is provided by the Married Women's Property Act, 1882, s 3, that where a wife's money is lent or entrusted to her husband for the purpose of any trade or business carried on by him or otherwise, it will be treated as assets of his estate in the case of his bankruptcy. The wife however, has a right to claim a dividend when the claims of all the other creditors for valuable consideration have been satisfied. For if she has lent money to her husband for private purposes (as in *In re Clark, Ex p Schulze*, 1898, 2 Q B 330), or has paid money as surety (as in *In re Cronmire*, 1901, 1 K B 480), she may prove as an ordinary creditor. And it does not appear that the onus of showing that the money was not made for the purposes of the

PRIORITY OF DEBTS (*cont.*), (*index*, p 231)

business is upon the wife. Thus, in *In re Cronmire* (1901, 1 K. B. 480), the wife lent a sum of money to her husband, and she claimed to prove against his estate for that sum. She did not in her affidavit say that the loan was made for the purpose of the husband's business, and the trustee of the estate adduced no evidence that it was made for that purpose, and he did not cross-examine the wife. It was held that the proof ought to be admitted.

(*h*) Joint and separate estate of partners (see *Partners and Joint Debtors*)

(*i*) Under administration order. As to priority of payments under an administration order made by a county court judge under s 122 of the Act of 1883, see *Administration Orders*, p 28.

PRIVILEGE (See *Discovery of Debtor's Property and Documents*, p 143.)

PROCEDURE (and see *Courts*)

(*a*) **GENERALLY** S 105 of the Act of 1883 makes the following general rules as to procedure —

(1) **Costs** Costs are generally in the discretion of the court, but where any issue is tried by a jury, the costs follow the event, unless, upon application made at the trial, for good cause shown, the judge before whom such issue is tried otherwise orders (s 105 (1)).

(2) **Adjournments** The court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose.

(3) **Amendments** The court may at any time amend any written process or proceeding under this Act upon such terms, if any, as it may think fit to impose.

(4) **Extension of time** Where the time for doing any act or thing is limited, the court may extend the time, either before or after the expiration thereof, upon such terms, if any, as the court may think fit to impose.

(5) **Evidence** Subject to general rules, the court may in any matter take the whole or any part of the evidence either *viva voce*, or by interrogatories, or upon affidavit, or by commission abroad.

(6) **Public examination of joint debtors** For the purpose of approving a composition or scheme by joint debtors, the court

PROCEDURE (*cont.*).

may if it thinks fit, and on the report of the official receiver that it is expedient so to do, dispense with the public examination of one of such joint debtors if he is unavoidably prevented from attending the examination by illness or absence abroad.

(b) PROCEDURE IN PARTICULAR CASES *Consolidation of petitions* (see *Petition* p 224), *Continuance of proceedings on death of debtor* (see *Death*, p 103), *Motions* (see *Motions*, p 202), *Petition against one partner* (see *Partners and Joint Debtors*, p 214), *Stay of proceedings* (see *Stay of Proceedings* p 307), *Transfer of Proceedings* (see *Courts*, p 100)

PROFESSIONAL MAN.

As to how far the earnings of a professional man can be appropriated to or for the use of his creditors, see *Realisation of Property*, p 261.

PROMISSORY NOTE. (See *Bill of Exchange*)

PROOF OF DEBTS (and see *Debts Provable in Bankruptcy*)

- (a) *Proof in ordinary cases* *General form of proof* *Necessity for proof* *Proof by partners* *Joint and separate debts*
- (b) *Proof on behalf of workmen* *Form of proof of debt of workman*, p 239
- (c) *Proof by secured creditor* (see *Secured Creditor*)
- (d) *Proof in respect of distinct contracts*
- (e) *Periodical payments*, p 240
- (f) *Proof for interest* (i) *Where interest is not provided for*, (ii) *Where interest is provided for*, (iii) *Interest after receiving order*.
- (g) *Debt payable at a future time*
- (h) *Admission or rejection of proofs*, p 241

(a) *Proof in ordinary cases*: A creditor must prove his debt as soon as may be after the making of the receiving order. It must be verified by affidavit, and may be delivered or sent to the official receiver, or to the trustee if a trustee has been appointed. The affidavit, which may be made either by the creditor himself, or by some person authorised by the creditor, must contain or refer to a statement of account, must specify vouchers, and state

PROOF OF DEBTS (*cont*), (*index*, p 236)

whether or no the creditor is a secured creditor The creditor must deduct all trade discounts, but he need not deduct discounts not exceeding 5 per cent agreed to be allowed for cash The creditor bears the cost of proving his debt, unless the court otherwise orders (B A, 1883, Sched II 1-8) An affidavit of proof of a debt may be sworn before an assistant official receiver, or any clerk of an official receiver authorised by the court or the Board of Trade (B R 219A) Any proof made in compliance with this rule has the same effect as if separate proofs had been made by each of the workmen and others, but must be stamped with one stamp as an ordinary proof (B R 220) (See *Admission or rejection of proofs*, par (h) *infra*)

Necessity for proof Where a petition is heard, the court will require proof of the debt upon which it is founded (B A, 1883, s 7 (2), and see *Petition*), and before a creditor can vote at the creditors' meeting, he must have proved a provable debt (see *Meetings of Creditors*, p 197)

As to the liability of a debtor who knowingly allows a false debt to be proved, see *Fraudulent Debtors*, p 170

General form of proof of debt (No. 72)

(Title)

No (a)

of 18

Re (a)
I, (b)
of _____ in the county of _____, make
oath and say —
(c) That I am in the employ of the under-mentioned creditor, and that I am
duly authorised by _____ to make this
affidavit, and that it is within my own knowledge that the debt hereinafter
deponed to was incurred, and for the consideration stated, and that such debt,
to the best of my knowledge and belief, still remains unpaid and unsatisfied
(d) That I am duly authorised, under the seal of the company hereinafter
named, to make the proof of debt on its behalf
1 That the said _____ w _____, at the date of the
receiving order, viz, the _____ day of _____ 18
and still _____ justly and truly indebted to (e) _____
in the sum of _____ pounds _____ shillings
and _____ pence for (f) _____
as shown by the account indorsed hereon, or by the following account, viz —
£ _____
for which sum or any part thereof I say that I have not nor hath (g)
_____ or any person by (h) _____
order to my knowledge or belief for (h) _____ use had

PROOF OF DEBTS (*cont*), (*index*, p 236)

or received any manner of satisfaction or security whatsoever, save an except the following (1)

Admitted to vote for

the day
of 18

Official Receiver
or Trustee

Admitted to rank for
dividend for

£ Sworn at
this day in the county of
 Official Receiver this day of 18
or Trustee Before me

} (g) Deponent's
signature
(g)

The proof cannot be admitted for voting at the first meeting unless it is properly completed and lodged with the Official Receiver before the time named in the notice convening such meeting

(a) *Here insert the number of matter, and the name of debtor, as given on the notice of meeting*

You should attend carefully to these directions

(b) *Fill in full name, address, and occupation of deponent*

If Proof made by creditor strike out clauses (c) and (d)

If made by clerk strike out (d)

If by agent of company strike out (c) (e) Insert me and to C D and E F, my co-partners in trade, if any, or, if by clerk, insert name, address, and description of principal

NOTE THIS

(f) State consideration [as—*Goods sold and delivered by me [and my said partner] to him [or them] at his [or their] request between the dates of, [or as the case may be]*

(See back)

(g) *My said partners or any of them or the above-named creditor (as the case may be)*

(h) *My or our or then or his (as the case may be)*

(i) *[Here state the particulars of all securities held, and where the securities are on the property of the debtor, assess the value of the same, and if any bills or other negotiable securities be held, specify them in the schedule]*

A

Particulars of Account referred to on other side

(Credit should be given for contra accounts)

If space not sufficient, let the particulars be annexed, but where the particulars are on a separate sheet of paper, the same must be marked by the person before whom the affidavit is sworn

The vouchers (if any) by which the account can be substantiated should be set out here

Proof by partners As to right of proof where partners carry on distinct trades, see *Partners and Joint Debtors*, p 215

Joint and separate debts As to the right of proof of joint and separate debts of a firm, see *Partners and Joint Debtors*, p 215

(b) *Proof on behalf of workmen* Where there are numerous claims for wages by workmen and others employed by the debtor,

PROOF OF DEBTS (*cont*), (*index*, p 236)

it is sufficient if one proof for all such claims is made either by the debtor, or his foreman, or some other person on behalf of all such creditors

• *Form of proof of debt of workmen* (No 73)

(Title)

I, [fill in full name, address, and occupation of deponent] of [the above-named debtor or the foreman of the above-named debtor, or on behalf of the workmen and others employed by the above-named debtor] make oath and say —

I that ["I" or "the said"] w , at the date of the receiving order, viz , the day 18 , and still justly and truly indebted to the several persons whose names, addresses, and descriptions appear in the schedule endorsed hereon in sums severally set against their names in the sixth column of such schedule for wages due to them respectively as workmen or others in ["my employ" or "the employ of the above-named debtor"] in respect of services rendered by them respectively to ["me" or "the above-named debtor"] during such periods before the date of the receiving order as are set out against their respective names in the fifth column of such schedule, for which said sums, or any part thereof, I say that they have not, nor hath any of them had or received any manner of satisfaction or security whatsoever

Sworn at
in the county of
this day of
one thousand eight hundred and ninety-
Before me

} Deponent's Signature

The schedule on the back of this form should contain the name, address and description of each workman, the period over which the wages are due and the amount due. It must also be signed by the deponent and the commissioner or officer administering the oath

(c) Proof by secured creditor (see *Secured Creditor*, p 290)

(d) Proof in respect of distinct contracts A debtor may be liable to pay a debt both as a partner and also as a private individual. Thus, a promissory note may be made by the members of a firm jointly, and also by some or all of them separately. If a debtor is liable as a sole contractor, and also as a member of a firm, or where he is a member of two or more distinct firms, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts against the properties respectively liable on the contracts (B A , 1883, Sched II (18)) So, where trust money has been misappropriated by a firm, proof may be made against the separate

PROOF OF DEBTS (*cont.*), (*under*, p 236)

estate of the trustee partner as well as against the joint estate (*In re Parkers, Ex p Sheppard*, 1887, 19 Q B D 84) .

(e) **Periodical payments** If rent or other payment falls due at stated intervals, and at the date of the receiving order there is no specific sum due, the creditor may prove for the proportionate part due at that date (B A , 1883, Sched II (19))

(f) **Proof for interest —**

(i) *Where interest not provided for* On any debt or sum certain, the creditor may prove for interest at a rate not exceeding four per centum per annum to the date of the order from the time when the debt was payable, if it is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment (B A , 1883, Sched II (20))

(ii) *Where interest provided for* Where a debt has been proved and such debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding five per cent without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full (B A , 1890, s 23)

This section considerably restricts the right of a creditor as to dividend, but not as to the amount of his proof, if he is entitled by virtue of an agreement with the debtor to interest at a higher rate. It enables the court of bankruptcy to reduce the amount payable by way of dividend to a moneylender who charges 60 per cent.

(iii) *Interest after receiving order* Generally speaking, there can be no proof for interest accruing after receiving order (*Quartermaine's Case*, 1892, 1 Ch at p 649), unless there is a surplus (see s 40, s s (5)) It does not matter that the interest is in a lump sum, as "the court looks at the substance of the transaction" (*Ex p Bath, In re Phillips*, 1882, 22 Ch D 450, per Jessel, M R , at p 454)

(g) **Debt payable at a future time** A creditor may prove for a debt not payable when the debtor committed an act of bankruptcy

PROOF OF DEBTS (*cont*), (*index*, p 236)

as if it were payable presently, and may receive dividends equally with the other creditors, deducting only a rebate of interest at the rate of five pounds per centum computed from the declaration of a dividend to the time when the debt would have become payable, according to the terms on which it was contracted (B A , 1883, Sched II (21))

“To gain the advantage of this section, the creditor proves the principal sum as a present debt, deducts the rebate, and then values the liability to pay interest and prove for that value. If the interest is 5 per cent the principal is simply proved for as a present debt, no rebate being deducted, having regard to s 23 of the Act of 1890, *supra* (*Williams on Bankruptcy*, p 402)

(h) **Admission or rejection of proofs** The trustee must examine every proof and the grounds of the debt, and in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof, he shall state in writing to the creditor the grounds of the rejection (B A , 1883, Sched II (22))

The rejection of a proof holds good after annulment of the bankruptcy (*Brandon v McHenry*, 1891, 1 Q B 538). A judgment is *prima facie* evidence of a debt, but the court may go behind it (*Ex p Revell*, 1884, 13 Q B D 720). (As to time for admission and rejection, see B R 227, 227a, 228)

As to consequences (to trustee) of rejecting a proof, see *Trustee*, p 322

If the trustee thinks that a proof has been improperly admitted, the court may, on the application of the trustee, after notice to the creditor who made the proof, expunge the proof or reduce its amount (*ib* , (23))

If a creditor is dissatisfied with the decision of the trustee in respect of a proof, the court may, on the application of the creditor, reverse or vary the decision (*ib* , (24)) The appeal cannot be entertained after the expiration of twenty-one days (R 230)

The court may also expunge or reduce a proof upon the application of a creditor if the trustee declines to interfere in the matter, or, in the case of a composition or scheme, upon the application of the debtor (*ib* (25)) If the application, though purporting to be made in the name of a creditor is really made on behalf of the

PROOF OF DEBTS (*cont*), (*index*, p 236)

debtor, it will be dismissed (*In re Tallerman, Ex p Rooney*, 1888, 5 Mor 119)

For the purpose of any of his duties in relation to proofs, the trustee may administer oaths and take affidavits (*ib*, (26))

The official receiver, before the appointment of a trustee, has all the powers of a trustee with respect to the examination, admission, and rejection of proofs, and any act or decision of his in relation thereto shall be subject to the like appeal (*ib*, (27))

PROPERTY (See Interpretation of Terms)**PROPERTY AVAILABLE FOR PAYMENT OF DEBTS**

As to how far property in the hands of the sheriff at the date of the bankruptcy is available for payment of debts, see *Sheriff*, p 295

PROPERTY DIVISIBLE AMONGST CREDITORS (and see Title of Trustee , Realisation of Property , Reputed Ownership)

- (i) *Generally . Property defined*
- (ii) *Limitations of the definition*, p 243
 - (a) *Annuity*
 - (b) *Instalments undelivered*
 - (c) *Goods in transitu*, p 244
 - (d) *Abandoned contract*
 - (e) *Contracts requiring personal skill*
- (iii) *Personal earnings*
- (iv) *Salary and income*
- (v) *After-acquired property*
- (vi) *Rights of action*, p 245
- (vii) *Equitable choses in action*
- (viii) *Action by undischarged bankrupt*, p 246
- (ix) *Property of bankrupt's wife*
- (x) *Property of bankrupt married woman*
- (xi) *Property intermixed with that of bankrupt*
- (xii) *Property abroad*

(1) **Generally** The property of a bankrupt which is divisible is described in s 44 of the B A , 1883 It comprises —

- (a) All such property as may belong to or be vested in the

PROPERTY DIVISIBLE AMGST. CREDS (*cont*), *index* p 242)

bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge, and,

(b) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice, and

(c) All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, etc (see *Order and Disposition, Reputed Ownership*, B A, 1883, s 44 (2) (i)-(iii))

It is necessary to consider the terms and effect of this section with some care

The term "property" is elsewhere defined See *Interpretation of Terms*, p 183

(ii) *Limitations of the definition* This wide definition might lead to the supposition that every conceivable form of property vested in a bankrupt is available for payment of his debts, but the courts have put many limitations on the powers of the trustee to bring everything into his net The effect of the more important decisions may be thus summarised —

(a) *Annuity* Property may be vested in a man until he become bankrupt In that case it does not pass to the trustee (*Roe v Galliers*, 1787, 8 T. R 133) So, an annuity given with a proviso that it should cease if the annuitant should alien, charge, or encumber it in any manner, was held to cease on the annuitant's insolvency (*Ex p Eyston, In re Thockmorton*, 1877, 7 Ch D 145) But a man cannot qualify his own interest in certain property by a condition determining or controlling it in the event of his own bankruptcy Thus, a clause in a contract for building a ship, whereby, on the builder's bankruptcy, the buyers may take possession of the ship and materials, and complete it as they please, is void as against the trustee (*Ex p Barker, In re Walker*, 1884, 26 Ch D 510).

(b) *Instalments undelivered* Goods which a man is under agreement to deliver by instalments to another who becomes bankrupt, do not vest in the insolvent, and need not be delivered unless the price is tendered (*Ex p Chalmers, In re Edwards*, 1873,

PROPERTY DIVISIBLE AMONGST CREDITORS (*cont.*), (*index* p 242)
L R 8 Ch 289) Hence they cannot be devoted to the payment of debts

(c) *Goods in transitu* Again, specific goods actually *in transitu* may be stopped at any time before they reach the trustee in bankruptcy. If so stopped they are not divisible in the bankruptcy (*Ex p Chalmers, supra*)

(d) *Abandoned contract* While the benefit of a contract is an asset in the bankruptcy, it ceases to be so if the contract is abandoned by the trustee. Thus when the purchaser of goods becomes bankrupt before the vendor has parted with the possession of the goods, the trustee in the bankruptcy has a right to elect to complete the contract by paying the agreed price in cash within a reasonable time.

(e) *Contracts requiring personal skill* The benefit of a contract involving the exercise of skill by the bankrupt himself is not necessarily an asset in the bankruptcy, for its performance depends upon the bankrupt himself (see *Knight v Burgess*, 1864, 33 L J Ch 727)

(iii) *Personal earnings* It is now well settled that the personal earnings of the bankrupt, except such part of them as are necessary for the maintenance of himself and his family, are divisible (*In re Roberts*, 1900, 1 Q B 122). The earnings of a professional man (e.g. a surgeon-dentist) come within this rule (*In re Rogers, Ex p Collins*, 1894, 1 Q B 425). And where after his discharge an agent, a bankrupt, recovered house agents' commission in respect of an introduction by him before the bankruptcy it was held that the money belonged to the trustee (*In re Byrnes, Ex p Henry*, 1892, 9 Mo 213).

(iv) *Salary and income* The salary or income of a bankrupt, and any pension which he is receiving from the government, may in certain circumstances be attached for the benefit of his creditors (see *Realisation of Property*, p 260).

(v) *After-acquired property* With regard to property acquired by the bankrupt after adjudication and before discharge, this does not automatically pass to the trustee for the benefit of the creditors. For it has been clearly laid down that until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him, *bonâ fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the

PROPERTY DIVISIBLE AMGST CREDTS (*cont*), (*index*, p 242) bankruptcy, are valid against the trustee (*Cohen v Mitchell*, 1890, 25 Q B D 262) In that case the bankrupt, who traded while still undischarged, having acquired a right of action against a third person for a conversion of part of his stock-in-trade, assigned the cause of action The assignee, having brought the action and recovered damages, was held entitled to retain them as against the trustee The above principle does not apply to real estate, whether equitable or legal, but only to personal property, including leaseholds (*Official Receiver v Cooke*, 1906, 2 Ch 661) It is important to note that such a dealing with after-acquired property must be for *value* Where an undischarged bankrupt insured his life and died intestate, the policy moneys were distributed amongst the next of kin The trustee did not know of the policy moneys until after the distribution It was held that he was entitled to the sums received by the next of kin, who had given no value therefor (*In re Bennett, Ex p O R*, 1907, 1 K B 148) (See also *After-acquired Property*)

With respect to the dealings of an undischarged bankrupt, the trustee must be continually on the alert, for if he stands by and allows a third person to obtain property of the bankrupt, he may become estopped from asserting his title (see *Troughton v Gulley*, 1766, Amb 630)

(vi) **Rights of Action** Rights of action for torts, *e g*, for trespass to the person, libel and slander, seduction of child or servant (*Stanton v Collier*, 1854, 23 L J Q B 116), and for breaches of contract which are wholly personal to the bankrupt (*e g*, breach of promise of marriage), do not pass to the trustee (*Beckham v. Drake*, 1849, 2 H L C 579). But where a right of action is in part personal and in part connected with the estate of the bankrupt, it will be severed (*ib*) A right of action for breach of contract (as where for instance the bankrupt alleges he has been wrongfully dismissed) will vest in the trustee if there was a breach before the bankruptcy (*ib*) Where, however the contract is unexecuted at the date of the bankruptcy, and the breach occurs afterwards, the right of action remains in the bankrupt (*Bailey v Thurston Ltd*, 1903, 1 K B 137)

(vii) **Equitable choses in action** (As to these, see *Williams on Bankruptcy*, pp 212, 213)

PROPERTY NOT DIVISIBLE AMONGST CREDITORS. (cont)

(2) PROPERTY HELD IN TRUST

- (a) *Express trusts*
- (b) *Trusts created by the bankrupt*
- (c) *Trust of property not in hands of bankrupt* What constitutes an assignment in equity The rule in *Ex p Waring*, p 249
- (d) *Trusts arising from the employment of the bankrupt.* Where bankrupt is a factor, p 250
- (e) *Banker's lien*

(1) **GENERALLY** The following property of the bankrupt is not divisible amongst his creditors —

- (i) Property held by the bankrupt on trust for any other person
- (ii) The tools (if any) of his trade, and the necessary wearing apparel and bedding of himself, his wife, and children, to a value, inclusive of tools and apparel and bedding, not exceeding £20 in the whole (B A, 1883, s 44) The second of these classes requires no explanation, but the first is highly technical

(2) **PROPERTY HELD IN TRUST** It is necessary to consider the meaning of property held on trust Trusts may be thus classified —

- (a) *Express trusts*, including trusts *virtute officii*, (b) *Trusts created by the bankrupt*, (c) *Trust of property not in hands of bankrupt*, (d) *Trusts arising from the employment of the bankrupt*, (e) *Banker's lien*

(a) **Express Trusts**. Estates of which a bankrupt is seised as a mere trustee do not pass to his creditors (see *Ex p Gemmys*, 1829, M and M'A 258) Again, property which is vested in a bankrupt *virtute officii* as executor, administrator, or trustee in bankruptcy, will not pass to his trustee in bankruptcy (*Ludlow v Browning*, 1708, 11 Mod 138)

(b) **Trusts created by the bankrupt**. Where a bankrupt has sold a debt, or mortgaged it to secure a debt of an amount greater at the time of the bankruptcy than the debt mortgaged, the bankrupt becomes a bare trustee for the debt, and the legal interest will not pass to his trustee (*Winch v Keeley*, 1787, 1 T R 619) But if any beneficial interest remains, the legal interest will pass to the

PROPERTY NOT DIVISIBLE AMGST CREDS (*cont*), (*see* p 246) trustee (*see Parnham v Hurst*, 1841, 8 M & W 743, *Castell v Boddington*, 1852, 1 E & B 66)

(c) **Trust of property not in hands of bankrupt** It is often difficult to determine whether a trust of property not in the hands of the bankrupt has been created which is available against the trustee. A contract to hold specific property or a specific debt in trust, that contract operates as an assignment in equity, without notice to the agent, debtor, or trustee for the bankrupt, and the trustee cannot claim, unless the contract is in fraud of the bankruptcy laws. The case of *Alexander v Steinhardt, Walker & Co*, 1903, 2 K B 208, affords an interesting illustration of this doctrine. In that case a firm of merchants in South America, being indebted to the plaintiff, consigned a quantity of ores to the defendants, the agents of the South American firm in England, and instructed them by letter to sell the ores and to pay to the plaintiff the balance of the proceeds remaining after payment of a specific sum to another creditor, they also wrote to the plaintiff advising him of what they had done. Before either of the letters arrived in England, the firm in South America became bankrupt, and the syndic in the bankruptcy telegraphed instructions to the defendants which amounted to a revocation of the directions given in the letter of the consignors as to the disposal of the proceeds of the sale of the cargo. It was held that upon the posting of the letters in South America there was a binding equitable assignment of the balance of the proceeds to the plaintiff, which remained unaffected by the supervening bankruptcy of the consignors (*see also Rodick v Gandell*, 1852, 1 De G M & G 763). If the property or fund is not specific, it is essential that the bankrupt shall specify the subject matter of the assignment by an order to his debtor or agent (*Ex p Adams*, 1855, 26 L T O S 96).

What constitutes an assignment in equity A promise to pay money when the debtor receives a debt from a third person is not an equitable assignment, so as to charge the debt in the hands of such third person (*Field v Megaw*, 1869, L R 4 C P 660, *In re Irving, Ex p Brett*, 1877, 7 Ch D 419).

With regard to property in the hands of the bankrupt himself, the contract to appropriate specific goods operates as an assignment

PROPERTY NOT DIVISIBLE AMGST CREDTS (*cont*), (*see* p 246) of those goods in equity But here the law steps in and says that if such a contract is in writing, it is a bill of sale, and is, unless registered, void as against the trustee in bankruptcy (*see Bill of Sale*) If the goods are not specified by the contract, it is necessary that they shall be specified before any interest can pass (*Ex p Imbest, In re Latham*, 1857, 1 De G & J 152)

The rule in Ex p Waring As a general rule, in order to create an assignment in equity there must be specific communication between assignor and assignee One exception to this arises in the case of holders of bills of exchange It was decided in *Ex p Waring*, that if property has been deposited by one party liable on bills of exchange not yet due, in the hands of another also liable thereon, in order to meet the bills, and before the bills become due or are paid, both parties to the deposit become bankrupt or insolvent, the holders of the bills, though ignorant when they took them of the deposit made to secure them, are entitled to have it applied in payment thereof (*Ex p Waring*, 1815, 19 Ves 345) "The principle of *Ex p Waring* applies where there are equities to adjust between two parties who become insolvent, and the adjustment of which operates, by a piece of good luck, so far as a third party is concerned, for the benefit of such third party"

It should be observed that bill-holders who have had the advantage of the foregoing rule are not thereby precluded from proving for the balance, after deducting the amount realised by the appropriated securities, against the estates of the drawer and acceptor, together with the other creditors (*City Bank v Luckie*, 1870, L R 5 Ch 773, 778) Nevertheless they can only prove for the balance, and when the benefit is received after proof, the proof must be proportionately reduced, and the dividends on the excess returned (*In re Banned's Banking Co, Ex p Joint Stock Discount Co*, 1875, L R 10 Ch 198)

Bills of exchange held by a banker In the case of bankers where bills are remitted to a banker by a customer by way of discount, they vest in the trustee on the banker's bankruptcy (*Ex p Sargeant*, 1810, 1 Rose, 153) It is otherwise if they are remitted for a particular purpose (*ib*) But if a party places in his banker's hands bills not yet due, the property continues in the party paying them in, for as it is well known that bankers receive bills as factors or

PROPERTY NOT DIVISIBLE AMGST CREDTS (*cont*), (*see* p 246) agents, in order to obtain payment of them when due, they do not pass to the trustee in bankruptcy of the bankers (*Thompson v Giles*, 1824, 2 B & C 422) The test is whether the amount or price of the bill constitutes an immediate debt due to the customer from the banker upon the receipt of the bill (*ib*, and see *In re Mills, Bawhee & Co*, *Ex p Stannard*, 1893, 10 Mor 193) So, it is conceived that where a customer places debenture bonds with his banker for collection as and when they fall due, the bonds would not pass to the trustee on the bank stopping payment If a person pays money to his banker to be applied to a specific purpose, and the banker stops payment before that purpose is named, the payer cannot recover the money, but has merely a right of proof as a general creditor (*In re Baines's Banking Co*, *Ex p Massey*, 1875, *ubi supra*)

(d) **Trusts arising from the employment of the bankrupt** In the course of his business, a bankrupt may often hold property on trust for other people Thus a man may hold goods as agent for sale If property so held can be distinguished from the mass of the bankrupt's property, it will not pass to his trustee (see, however, *Reputed Ownership*, p 271) It has been held, with reference to all trust property, that if it cannot be distinguished from the bankrupt's own property, it will be divisible amongst the creditors (see *In re Watson & Co*, 1905, 91 L T 655, and cases enumerated, *Williams*, p 186)

Where bankrupt a factor It was formerly laid down that if a bankrupt factor had sold goods and the price was not yet paid, or bills given for the price, neither the right to recover the price nor the bills would pass to the trustee, but if the bankrupt factor received the price of goods sold by him, his principal must, unless the money so received was earmarked, prove for the amount *pari passu* with other creditors (*Whitcomb v Jacob*, 1711, 1 Salk 160) In *Ex p Cooke*, *In re Shachan*, 1876, 4 Ch D 123, it was held that money paid by a broker into his banking account could be followed by a customer

The court, however, is reluctant to seize trust money, and will protect it if possible So if a trustee pay into his own account at his bank, the person for whom he holds it may follow and have

PROPERTY NOT DIVISIBLE AMONGST CREDITORS (cont.), (see p 246)

a charge upon it (*In re Hallett's Estate, Knatchbull v Hallett*, 1879, 13 Ch D 696 See also *Ex p Dale & Co, In re West of England Bank*, 1879, 11 Ch D 772) Where a man has mixed trust and private money, the court will presume that he has expended his own moneys rather than the trust moneys (*Harris v Truman & Co*, 1882, 9 Q B D 264)

(e) **Banker's lien** It should be remembered that " Bankers have a general lien on all securities in their hands for their general balance, unless there be evidence to show that any particular security was received under special circumstances which would take it out of the common rule " (*Brandao v Barnett*, 1846, 12 Cl & F 787, *Jones v Peppercorne*, 1858, 28 L J Ch 158)

PROPERTY OF BANKRUPT (and see Realisation of Property, Property Divisible amongst Creditors, Property not Divisible, Statement of Affairs)

All the property of a bankrupt must be set out in the statement of affairs (see *Statement of Affairs*)

As to when the title of the trustee to the bankrupt's property begins to accrue, see *Title of Trustee*, p 312

PROSECUTION

As to prosecution of a debtor who is guilty of an offence under the Debtors Act, see *Fraudulent Debtors*, p. 174

PROTECTED TRANSACTIONS.

- (i) *Generally*
- (ii) *Text of s 49*
- (iii) " *Any contract, dealing, transaction* " —
 - (a) *Contracts, etc, protected*
 - (b) *Contracts, etc, not protected*, p 253
- (iv) *Before the date of the receiving order*
- (v) *Notice of act of bankruptcy* p 254
 - (a) *What is*
 - (b) *Notice to solicitor, etc*
 - (c) *Service of notice*
- (vi) *Available act of bankruptcy*

PROTECTED TRANSACTIONS (*cont.*), (*infra*, p 251).

(1) **Generally** . It is elsewhere pointed out that certain transactions entered into with a debtor prior to bankruptcy may be set aside as fraudulent and void against the trustee. Thus, a man cannot assign away all his property and show his trustee in bankruptcy a pair of empty pockets (see *Fraudulent Preference*, p 176, *Voluntary Settlement*, p 337). But certain *bona fide* dealings with a bankrupt are perfectly lawful. These are enumerated in s 49.

(ii) **Text of s 49** . S 49 of the B A, 1883, provides that —

“Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment (see *Execution Creditors*, *Sheriff*), and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy —

(a) Any payment by the bankrupt to any of his creditors

(b) Any payment or delivery to the bankrupt

(c) Any conveyance or assignment by the bankrupt for valuable consideration

(d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration

Provided that both the following conditions are complied with, namely —

(1) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order, and

(2) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time.”

Ss (a)–(c) do not call for comment, but ss (d) requires elucidation

(iii) “Any contract, dealing, transaction” —

(a) **Contracts, etc., protected** . These include (*inter alia*) a lien (*Bowman v Malcolm*, 1843, 11 M & W 833), a seizure of goods

PROTECTED TRANSACTIONS (*cont*), (*ind*ev, p 251)

under an irrevocable licence to seize (*Kiehl v Great Central Gas Co*, 1870, L R 5 Ex 289), that being a "transaction", removal of goods by the true owner so as to take them out of the order and disposition of the bankrupt (*Graham v Furber*, 1854 14 C. B 134)

A mortgagee of book debts who, without notice of an act of bankruptcy, gives the debtor notice of the assignment is protected (*Rutter v Everett*, 1895, 2 Ch 872, see also *In re Waugh, Ex p Dickinson*, 1876, 4 Ch. D 524)

Where a debtor, after an act of bankruptcy and the petition, but before receiving order, assigned to his creditor a sum of money which was payable to him by a third person, as security for the debt, and gave notice of the assignment The creditor took the assignment *bonâ fide* and without notice of the act of bankruptcy or of the bankruptcy petition This assignment was held valid (*In re Dunkley*, 1905, 2 K B 683, and cf *In re Badham, Ex p Palmer*, 1893, 10 Mor 252)

Where transaction an act of bankruptcy A transaction within the section is protected although it be an act of bankruptcy (*Shears v Goddard*, 1896, 1 Q B 406)

Where a transaction comes within this section, the person carrying it out with the bankrupt is not affected by the relation back of the trustee's title (see *Title of Trustee*, p 312)

(b) Contracts, etc., not protected . But the following are not protected "contracts, dealings or transactions" Where a creditor takes over the whole or substantially the whole of the property of his debtor in payment of a past debt, and knows that there are other creditors, as in so doing he cannot be said to be acting in good faith (*In re Jukes, Ex p O R*, 1902, 2 K B 58), any transaction void under the Bills of Sale Acts, 1878, and 1882 (see *Ex p Payne, In re Cross*, 1879, 11 Ch D 539), a charging order on money in court (*In re O'Shea's Settlement*, 1895, 1 Ch 325), an order charging the share of a bankrupt partner under the Partnership Act, 1890, s 23 (*Wild v Southwood*, 1897, 1 Q B 317), and a garnishee order (*Ex p Pillers, In re Curtoys*, 1881, 17 C D 653, and see B A, 1883, s 45 (1)), but see *In re Webster, Ex p Trustee* 1907, 23 T L R 275 "While

PROTECTED TRANSACTIONS (*cont*), (*index*, p 251)

the section protects a contract, etc., made without notice, it does not purport to protect any conveyance or assignment made in pursuance of a protected contract" (*Powell v Marshall, Parkes*, 1899, 1 Q B 710, at p 714) A secured creditor, however, cannot receive payment of his debt from his debtor and hand over the securities after an act of bankruptcy on the part of the debtor (*Ponsford v Union of London and Smiths Bank*, 1906, 2 Ch 444)

(iv) "Before the date of the receiving order". These words are important A person who, in fulfilment of a contract with the bankrupt made before the receiving order, pays him a sum of money after the order, may be compelled to pay again to the trustee, although he had no notice of the act of bankruptcy (*Ex p Rabbidge*, 1878, 8 Ch D 367)

(v) "Notice of act of bankruptcy" —

(a) *What is* Notice of an act of bankruptcy means knowledge thereof or wilfully abstaining from acquiring such knowledge (*Bird v Bass*, 1843, 6 M & G 143) Knowledge that a defendant has been absenting himself from business has been held sufficient (*Smith v Osborn*, 1858, 1 F & F 267), although the person denies that he knew that such facts amounted to an act of bankruptcy (*Lackington v Elliott*, 1844, 8 Scott, N R 275) Notice by the bankrupt that he has committed several acts of bankruptcy (*Udal v Walton*, 1845, 14 M & W 254) is sufficient, but notice of an intention to commit an act of bankruptcy is not (*Ex p Halifax*, 1842, 2 M. D. & D. 544), (see also various cases referred to in *In re Slobodinsky, Ex p Moore*, 1903, 2 K B 517)

(b) *Notice to solicitor, etc* It is sufficient if notice be given to a solicitor in connection with some matter in which he is employed In the case of partners or trustees, notice to one partner or trustee will suffice, but notice to a sheriff (or his officer, *Ex p Schulte, In re Matanlé*, 1874, L R 9 Ch 409) in possession is not notice to the execution creditor (*Ramsay v Eaton*, 1842, 10 M & W 22)

(c) *Service of notice* A notice sent by post is good, unless the alleged recipient can show that he was prevented from and did not in fact read the letter (*Bird v Bass*, 1843, 6 M & G 143) The onus of proving want of notice lies apparently upon the person

PROTECTED TRANSACTIONS (*cont*), (*index*, p 251).

who relies on such want of notice (*Ex p Schulte, In re Matanié*, 1874, L R 9 Ch 409)

(vi) Available act of bankruptcy. See *Available Act of Bankruptcy*

PROXY.

At creditors' meetings proxies may be used A proxy may be general or special A general proxy may act in everything on behalf of the creditor whom he represents He must be in the regular employment of the creditor, but the official receiver may act as general proxy Special proxies may act in relation to certain matters enumerated in B A, 1890, s 22 (3). (As to these, and as to proxies generally, see *Meetings of Creditors*, p 198)

PUBLIC EXAMINATION

- (i) *Time for examination*
- (ii) *When examination dispensed with*, p 256
- (iii) *Who may examine the debtor*
- (iv) *Duty of official receiver and trustee*
- (v) *Use of debtor's answers in other proceedings*, p 257.
- (vi) *Where examination insufficient*
- (vii) *Concealment by debtor*
- (viii) *In small bankruptcies*

(i) **Time for examination** A receiving order having been made, the debtor must attend at court on the appointed day, in order to undergo his public examination He is then examined in public as to his conduct, dealings, and property (B A, 1883, s 17 (1)) The public examination is held as soon as conveniently may be after the expiration of the time for the submission of the statement of affairs (*ib*, (2)), the exact time being fixed by the court (B R 184) Notice of the time and place must be given to the debtor and to the creditors by the official receiver (B R 186) If the debtor fails to appear, a warrant may issue for his arrest (B R 185, and see *Control over Person and Property of Debtor*, p 92)

Memorandum of public examination of debtor (No 47)

(Title)

Memorandum,—That I

th above-named debtor, being sworn and examined upon my oath, say that

PUBLIC EXAMINATION (*cont.*), (*index*, p 255)

the notes of my public examination marked "A," and appended hereto, were read over by or to me and are correct

And I further say, that at the time of this my examination, I have delivered up to the Official Receiver or the Trustee of my estate, all property, estate, and effects, and all books, papers, and writings relating thereto

And I further say, that I have made a full disclosure of all my assets and of all my debts and liabilities of whatever kind, and that I have not removed, concealed, embezzled, or destroyed any part of my estate, real or personal, nor any books of accounts, papers, or writings relating thereto, with an intent to defraud my creditors, or to conceal the state of my affairs

[*Here insert any special matter*]

Signature

Dated the

day of

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(ii) When examination dispensed with For the purpose of approving a composition or scheme by joint debtors, the public examination of one of such debtors may, on the recommendation of the official receiver, be dispensed with if he cannot attend owing to illness or absence abroad (B A , 1883, s 105 (6)) Again, if the debtor is a lunatic, or if he suffers from such mental or physical infirmity that he is unfit to attend, the court may dispense with the examination, or direct that he be examined in such manner and place as may seem expedient (B A , 1890, s 2)

(iii) Who may examine the debtor Any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor concerning his affairs, and the causes of his failure (B A , 1883, s 17 (4)) Even a solicitor must be authorised in writing, and must produce his authority if required (*R v Registrar of Greenwich County Court*, 1885, 15 Q B D 54)

(iv) Duty of official receiver and trustee The official receiver must take part in the examination of the debtor, and may, if specially authorised by the Board of Trade, employ a solicitor with or without counsel (B A , 1883, s 17 (5)) The trustee may also take part, and the court may put such questions as it thinks proper to the debtor The debtor must be examined upon oath, and must answer all such questions as the court shall put or allow to be put to him Such notes of the examination as the court thinks proper are taken down in writing, and must be read over to or by and signed by the debtor, and may thereafter be used in evidence against him They are also to be open to the inspection of any creditor at all reasonable times When the court is of

PUBLIC EXAMINATION (*cont*), (*under*, p 255)

opinion that the debtor's affairs have been sufficiently investigated, it must declare that his examination is concluded, but such order cannot be made until after the day appointed for the first meeting of creditors (B A, 1883, s 17, (6)-(9), B A, 1890, s 2)

(v) Use of debtor's answers in other proceedings One important feature of the public examination is that the debtor's answers may always be used against him in subsequent proceedings In order to prove what he said it is not absolutely necessary to produce the notes, as his statements may be proved by oral testimony (*R v Erdheim*, 1896, 2 Q B, 260) In that case, Lord Russell, L C. J., said (at p 269) "I regard the statutory provision, therefore, as one intended to provide only for the most authentic way of presenting to the court the statements made, but not at all as intending to exclude all other modes of giving evidence of statements made by the defendant in the course of his examination We cannot give effect to the objection made without construing the statute as if it said—which it does not—that the authenticated examination shall alone be received as evidence of the statements so made"

(vi) Where examination insufficient: If the court is of opinion that the results of the examination are insufficient to inform the trustee as to the bankrupt's affairs, it should adjourn the examination (*Ex p Milne, In re Denton*, 1873, 28 L T 175).

(vii) Concealment by debtor To bribe or endeavour to bribe the debtor to suppress or conceal any facts which he should bring out is punishable as a contempt of court (*In re Hooley, Rucker's Case*, 1898, 79 L T 306) In that case Mr Justice Wright, who fined the respondent £200, said "Having regard to the objects of an examination in bankruptcy, which includes the fullest disclosure of the bankrupt's dealings, I cannot doubt that such a negotiation would be contempt of court—a corrupt influencing of a witness to disregard his duty as a witness and as a bankrupt, and to endeavour to conceal what it is his primary duty to disclose"

(viii) In small bankruptcies As to public examination in a small bankruptcy, see *Small Bankruptcies*, p. 298

PUNISHMENT OF FRAUDULENT DEBTORS. (See *Fraudulent Debtors.*)

PURCHASE.

As to the validity of a *bona fide* purchase of goods from the sheriff by a creditor, see *Sheriff*, p 296

"PURCHASER IN GOOD FAITH"

As to the meaning of this phrase, see *Voluntary Settlement*

QUORUM

As to the quorum which is necessary at a meeting of creditors, see *Meeting of Creditors* p 197

RASH AND HAZARDOUS SPECULATION.

The fact that a bankrupt has been given to rash and hazardous speculation is ground for refusing or placing conditions on discharge (see *Discharge of Bankrupt*, p 127)

RATES AND TAXES

As to the payment of rates and taxes in priority, see *Priority of Debts*, p 231

REALISATION OF PROPERTY

(a) SEIZURE OF BANKRUPT'S PROPERTY

(b) WHERE BANKRUPT IS A BENEFICED CLERGYMAN

(c) APPROPRIATION OF PAY SALARY OR INCOME

(i) *Bankrupt employed by Crown*

(ii) *Bankrupt in receipt of other salary or pension*

(iii) *Saving of right of dismissal*, p 260

(iv) *Effect of the section*

(v) "Pay or salary"

(vi) "Salary or income," s s (2)

(d) DUTY OF DEBTOR AS TO, p 261

(e) DEBTOR'S DEBTORS

(a) SEIZURE OF BANKRUPT'S PROPERTY The court may grant a warrant for the seizure of any property of the bankrupt which is in his possession or that of any other person (B A, 1883, s 51) For this purpose any house, building etc., may be broken open The court may also grant a warrant to any constable or officer of the court to search any such house or building (ib) Any such warrant may be enforced in Scotland, Ireland, the Isle of Man, the

REALISATION OF PROPERTY (*cont*), (*index*, p 258)

Channel Islands, or elsewhere in His Majesty's dominions (B A , 1883, s 119)

- (b) WHERE BANKRUPT IS A BENEFICED CLERGYMAN The profits of a benefice may be sequestrated by the trustee (B A , 1883, s 52 (1)) Such a sequestration has priority over any other sequestration issued after the bankruptcy in respect of a debt provable in the bankruptcy, except a sequestration issued before the date of the receiving order by a person who had no notice of an available act of bankruptcy (*ib*) The sequestrator must, however, pay such stipend to the bankrupt as the bishop shall think proper (*ib* s s (2)) Such stipend must not exceed that which the bishop might appoint to a curate duly licensed to serve the benefice in case the bankrupt had been non-resident He must also pay out of the profits of the benefice the salary payable to any curate in respect of his duties performed by him as such during the four months before the receiving order not exceeding £50

It appears that the profits of a benefice do not vest in the trustee until he has obtained his sequestration (*Hopkins v Clarke*, 1864, 5 B & S. 753)

(c) APPROPRIATION OF PAY, SALARY, OR INCOME —

(i) Bankrupt employed by Crown . Where a bankrupt is an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the trustee shall receive so much of the bankrupt's pay as the court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct Before making any order, the court communicates with the chief officer of the department as to the amount, time, and manner of the payment to the trustee, and obtains the written consent of the chief officer to the payment (B A , 1883, s 53 (1))

(ii) Bankrupt in receipt of other salary or pension . Where a bankrupt is in the receipt of a salary or income other than as aforesaid, or is entitled to any half pay, or pension, or to any compensation granted by the Treasury, the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half pay, pension, or

REALISATION OF PROPERTY (*cont.*), (*index*, p 258)

compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct (*ib s s* (2))

(iii) **Saving of right of dismissal** Nothing in the section takes away any power of the chief officer of any public department to dismiss a bankrupt, or to declare the pension, half pay, or compensation of any bankrupt to be forfeited (*ib s s* (3))

(iv) **Effect of the section** The income, pay, salary, or pension of a bankrupt may in general be devoted in whole or in part to the payment of his creditors. If he is in the Government service, however, no order vesting any part of his pay or salary in the trustee can be made without the consent of the chief officer of his department. Numerous cases have arisen as to the meaning of "salary," etc

The effect of *s s* (1) is that if a bankrupt is receiving pay from the Crown, the court can only direct a portion of that pay to be handed to the trustee with the consent of and to the extent agreed by the chief officer of the particular Government department where the bankrupt is employed. Where, however, the bankrupt has a pension from the Crown, or is in receipt of any salary or income in any employment, the court has unfettered discretion as to the allocation of all or part of that salary or income to the trustee for the benefit of the creditors.

Certain words and phrases used in the section require explanation

(v) **"Pay or salary"** These words do not extend to a mere voluntary allowance (*Ex p Webber*, 1886, 18 Q B D 111), nor to pay received for past services (*In re Ward*, 1897, 1 Q B 266), which latter form of emolument can be treated under *s s* (2)

(vi) **"Salary or income"** (*s s* 2) The cases decided as to the meaning of these words may be thus summarised. The following emoluments may be attached by a trustee in bankruptcy —The pension of a retired judge of a Crown Colony (*Ex p Huggins*, 1882, 21 Ch D 85), the retired pay of an officer who remains in the army reserve (*In re Ward, supra*), the pay of a commercial traveller engaged at £100 a year payable weekly (*In re Brindley*, 1887, 4 Mor 104), the salary of an actor (*In re Shme*, 1892, 1 Q B 522), or the income of a surgeon-dentist carrying on business in partnership (*In re Rogers, Ex p Collins*, 1894, 1 Q B 425). Personal earnings which are reasonably necessary for the maintenance of the bankrupt

REALISATION OF PROPERTY (*cont.*), (*under*, p 258)

and his family do not, however, pass to the trustee (*In re Graydon*, *Ex p O R*, 1896, 1 Q B 417)

But neither the prospective earnings of a professional man (*Ex p Benwell*, 1884, 14 Q B D 301), nor the wages of a collier (*In re Jones*, *Ex p Lloyd*, 1891, 2 Q B 231) can be attached. If an order is made under the section, it is put an end to by an order of discharge, unless expressly excepted (*In re Gold*, 1891, 8 Mor 45)

(d) **DUTY OF DEBTOR AS TO** As to the duty of a debtor to aid in the realisation of his property, see *Duty of Debtor*, p 154.

(e) **DEBTOR'S DEBTORS** Persons who owe money to the debtor may be ordered to deliver it up (see *Discovery of Debtor's Property and Documents*, p 142)

REASONABLE SECURITY

On application to approve a composition or scheme of arrangement, the court must be satisfied that reasonable security is given for the carrying out of the scheme (see *Composition or Scheme of Arrangement*, p 84)

RECEIPT.

As to how far a receipt is a bill of sale, see *Bills of Sale*, p 53

RECEIPT OF THE DEBT.

As to the meaning of this phrase, which is used in s 45 of the B A, 1883, see *Execution Creditor*, p 159. The attachment of a debt is completed by the receipt of a debt (see *ib.*)

RECEIVER (and see *Interim Receiver* ; *Official Receiver*).

A receiver cannot petition in respect of a debt due to the estate of which he is receiver (*In re Sacker*, 1888, 22 Q B D 179)

RECEIVING ORDER

- (i) *General effect of receiving order*
- (ii) *When receiving order takes effect*
- (iii) *Powers of official receiver*
- (iv) *Effect of order on creditors, and then remedies*, p 263
- (v) *Effect of order on secured creditors*
- (vi) *Annulment of order*
 - (a) *Where debtor or his property in Scotland or Ireland, etc*
 - (b) *Where there is a composition or scheme*
- (vii) *Rescission of receiving order*, p 264

RECEIVING ORDER (*cont*)(viii) *Rules as to*(ix) *Forms of*, p 265(x) *Receiving order in lieu of committal*, p 266

(i) **General effect of receiving order** A receiving order is made on the petition of a creditor or the debtor himself (B A , 1883, s 5)

On the making of the order an official receiver is constituted receiver of the property of the debtor, and thereafter, except as directed by the Act of 1883, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy has any remedy against the property or person of the debtor in respect of the debt, nor can he commence any action or other legal proceedings unless with the leave of the court, and on such terms as the court may impose (B A , 1883 s 9 (1)) This section, however, does not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if the section had not been passed (*ib* , s s (2))

As to effect of a receiving order against a trustee, see *Trustee*, p 322

(ii) **When receiving order takes effect** A receiving order is deemed to be made when pronounced and from that day on the debtor is protected (*In re Manning* 1885, 30 Ch D 480) So, an action brought against the debtor nearly two years after the receiving order was restrained (*Brownscombe v Fan*, 1887, 58 L T 85)

Interest accruing on creditors' debts after receiving order cannot be paid unless there is a surplus (see *Proof of Debts*, p 240)

As to the validity of certain transactions with the bankrupt prior to the date of the receiving order, see *Protected Transactions*, p 252

As to the duty of the sheriff when he receives notice of a receiving order, see *Sheriff*, p 294

(iii) **Powers of official receiver** In addition to the powers conferred on him as receiver, the official receiver may also exercise the powers of interim receiver if conferred upon him by the court under s 10 (see *Interim Receiver*) Independently of that section, the position of the official receiver may be thus summarised —

When a receiving order is made he becomes receiver of the

RECEIVING ORDER (*cont*), (*under*, p 261)

property (s 9, *supra*) Where there is adjudication, he acts as interim receiver until the trustee is appointed (s 70 (1) (a))

Where there is no adjudication (s 21), or where there is a vacancy in the office of trustee, the official receiver can exercise all the functions of the trustee (s 70 (1) (g)) (See, generally, *Tinquant v B of T*, 1886, 11 A C 286)

As to receiving order against a firm, see *Partners and Joint Debtors*, p 215, and as to consolidation of receiving orders made against partners, see *ib*

(iv) Effect of order on creditors and their remedies Although the receiving order deprives the creditors of their remedies it does not divest the debtor of his property (*Rhodes v Dawson*, 1886, 16 Q B D 548, per Lindley, M R, at p 553), see also *In re Smith, Ex p Mason*, 1893, 1 Q B, 323) The debtor is protected from the day when the receiving order is made, although it is not then (*In re Manning*, 1885, 30 Ch D 480) or is not afterwards (*Blount v Whiteley*, 1899, 79 L T 635) drawn up

A receiving order does not prevent certain remedies being pursued. Thus it will not enable the debtor to escape imprisonment for non-payment of trust moneys, etc, with regard to which s 4 of the Debtors Act, 1869, makes special provision (see *In re Smith, Hands v Andrews*, 1893, 2 Ch 1)

(v) Effect of order on secured creditors —

A secured creditor will only be affected by a receiving order to the extent to which his claim is not covered by his security (see *Secured Creditor*)

(vi) Annulment of Order —

(a) *Where debtor or his property in Scotland or Ireland, etc* If in any case where a receiving order has been made it appears to the court by which such order was made, upon an application by the official receiver, or any creditor or other person interested, that a majority of the creditors are resident in Scotland or in Ireland, and that from the situation of the property or other causes, his estate and effects ought to be distributed among the creditors under the Bankrupt Laws of Scotland or Ireland, the court, after such inquiry as to it shall seem fit, may rescind the receiving order and stay all proceedings on, or dismiss the petition upon such terms, if any, as the court may think fit (B A, 1883, s 14)

RECEIVING ORDER (*cont.*), (*index*, p 261)

The mere fact that there is an Irish or Scotch bankruptcy in existence does not limit English jurisdiction to make a receiving order (*Ex p McCulloch*, 1880, 14 Ch D 716). Similarly, a prior foreign bankruptcy does not take away the court's jurisdiction. (*In re Artola*, 1890, 24 Q B D 640)

(b) *Where there is a composition or scheme* A receiving order will also be rescinded or annulled where the court sanctions a composition or scheme under s 3 of the B A, 1890 (see *Composition or Scheme of Arrangement*)

(vii) *Rescission of receiving order* The court may rescind a receiving order (*Ex p Wemyss*, 1884, 13 Q B D 244), and may decline to rescind at the request of all the creditors, if the official receiver opposes because he is not satisfied with the debtor's conduct (*Ex p Leslie*, 1887, 18 Q B D 619). Amongst other things the conduct of the debtor and the causes of his insolvency must be closely considered (*In re Flatau*, *Ex p O R*, 1893, 2 Q B 219). An order was rescinded where the debtor's father had paid the creditors 10s in the £, and they had withdrawn their proofs and released the debtor (*In re Izod*, *Ex p O R*, 1898, 1 Q B 241), but in *In re Flatau* (*supra*) rescission was refused although the debtor had paid the petitioning creditor's debt and costs, and had obtained his consent to the order being rescinded. It is a matter for the unfettered discretion of the court in each particular case.

In *In re Betts*, *Ex p. O R*, 1901, 2 K B 39, the court rescinded an order where the debtor was undischarged under three previous bankruptcies, in two of which he had himself petitioned with the view of evading committal orders (cf *In re Pamter*, 1895, 1 Q B 85, *In re Archer*, 1904, 20 T L R 390, *In re Hancock*, 1904, 1 K B 585).

(viii) *Rules as to* Rules 176-183, which relate to receiving orders, may be epitomised as follows. The order is prepared by the registrar. If it is made on a creditor's petition, it must describe the nature and date of the alleged act of bankruptcy, while every receiving order must require the debtor to attend before the official receiver at the proper time. It is the duty of the official receiver to cause a copy of the order to be served on the debtor. The fact of a receiving order having been made is communicated to the Board of Trade by the proper officer, and is then advertised.

If the act of bankruptcy upon which the receiving order is to be

RECEIVING ORDER (*cont.*), (*index*, p 261)

founded is failure to comply with the conditions of a bankruptcy notice (see *Bankruptcy Notice*), the court has no power to make the order if the bankrupt is taking steps to have the bankruptcy notice set aside. As to the costs down to and including the making of a receiving order, if the creditor who is seeking to have the order made is unsuccessful, he must bear the costs, but if an order is made, then the costs are to be taxed, and are to be payable out of the proceeds of the estate in the manner further provided for by the rules.

(ix) Forms of receiving order —

(a) *Receiving order on creditor's petition* (No 29)

(Title)

On the petition (dated the _____ day of _____ 188 ,
and numbered _____ of 188) of J S , of
a creditor filed the [insert date] and on reading

and
hearing and it
appearing to the Court that the following act or acts of bankruptcy has or
have been committed, viz —

[Set out the nature and date or dates of the act or acts of bankruptcy on which
the order is made]

A receiving order is hereby made against A B [insert name, addresses, and
descriptions of debtor as set out in petition], and the official receiver [or Mr
C D , an official receiver] of this Court is hereby constituted receiver of the
estate of the said debtor

Dated this _____ day of _____ 188

By the Court,
Registrar

NOTE —The above-named debtor is required, immediately after the service
of this order upon him, to attend the official receiver of the Court at his offices
at [insert the place at which the debtor is to attend on the official receiver]

The official receiver's offices are open every week-day from 10 a m to
4 p m , except _____ days, when they close at _____ p m

Indorsement on Order

The name and address of the solicitor to the petitioning creditor are [insert
name and address]

(b) *Receiving order on debtor's petition* (No 28)

(Title)

On the petition of the debtor himself, filed the _____ day
of _____ 188 , and numbered _____ of 188 , a receiving order is
hereby made against A B [insert name, addresses, and descriptions of debtor
as set out in petition], and the official receiver [or, Mr C D , an official receiver]
of this Court is hereby constituted receiver of the estate of the said debtor

Dated this _____ day of _____ 188

By the Court,
Registrar

NOTE —The above-named debtor is required immediately after the service
of this order upon him to attend the official receiver of the Court at his offices
at [insert the place at which the debtor is to attend on the official receiver]

RECEIVING ORDER (*cont*), (*index*, p 261)

The official receiver's offices are open (except on holidays) every week-day from 10 a m to 4 p m, except _____ days, when they close at _____ p m
Indorsement on Order

The name and address of the solicitor (if any) to the debtor are [*insert name and address*]

(x) Receiving order in lieu of committal Where an application is made to the court for the committal to prison of a debtor who has made default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment, the court may decline to commit, and in lieu thereof, with the consent of the judgment creditor, may make a receiving order against the debtor In such a case the debtor is deemed to have committed an act of bankruptcy at the time the order is made (Debtors Act, 1869, s 5, B A, 1883, s 103 (5)) The bankruptcy is deemed to have relation back to the time of the order, or if the bankrupt is proved to have committed any previous act of bankruptcy within three months of the order, then to the date of that act of bankruptcy (B A, 1890, s 20, and see *Title of Trustee*)

Only a judgment creditor can apply for an order in lieu of committal The court cannot make an order (just as it cannot commit the debtor to prison) without evidence of the debtor's means (*In re a Debtor*, 1904, 91 L T 321) (As to the rescission of such an order, see *Ex p Hughes*, 1887, 4 Mor 236)

Form of receiving order in lieu of committal under section 103 (5) of the Bankruptcy Act, 1883 (No 29A)

The Bankruptcy Act, 1883, and the Debtors Act, 1869
 In the _____ (by transfer
 from _____)

In the matter of _____, a debtor

Whereas an order was made against the above-named debtor on the _____ day of _____ for the payment of his debts in full (or by instalments of _____)

And whereas the debtor has made default in payment of payable in pursuance of the said order

Now upon reading the consent of the judgment creditor that a receiving order should be made against the debtor in lieu of an order for commitment to prison, and the prescribed fees having been paid

It is ordered that a receiving order be made against the debtor in lieu of an order of commitment to prison, and a receiving order is hereby made against the debtor, and the Official Receiver of this Court is hereby constituted Receiver of the estate of the said debtor

Dated this _____ day of _____

189
 By the Court,
 Registrar

NOTE —The above-named debtor is required immediately after the service

RECEIVING ORDER (*cont*), (*index*, p 261)

of this order upon him to attend the Official Receiver of the Court at his offices at

The Official Receiver's offices are open every week-day from
to except , when they close
at

Indorsement

The name and address of the solicitor to the judgment creditor are

RECORD BOOK.

This book must be kept by the official receiver until trustee appointed, and afterwards by the trustee. It records all minutes, proceedings, resolutions of creditors, or committee of inspection, and other matters necessary to give a correct view of the administration (R 285). The debtor cannot inspect the record book except in special circumstances (*In re Solomons*, 1904, 2 K B 760).

REDEMPTION OF BILL OF SALE (See Bills of Sale, p. 57.)

REDEMPTION OF SECURITY.

As to redemption of the security of a secured creditor by the trustee in bankruptcy, see *Secured Creditor*, p 290

RE-DIRECTION OF LETTERS. (See Letter.)

REGISTRATION.

As to registration of deed of arrangement, see *Deed of Arrangement*, p 118. As to the registration of a bill of sale, see *Bills of Sale*, p 68

REGISTRARS IN BANKRUPTCY.

(a) **Powers of Registrars** The registrars in bankruptcy of the High Court, and the registrars of a County Court having jurisdiction in bankruptcy, have the following powers and jurisdiction, and any order made or done by such registrars in the exercise of such powers and jurisdiction are deemed the order or act of the court (1883, s 99 (1))

Subject to general rules limiting the powers conferred by this section, a registrar has power (a) To hear bankruptcy petitions, and to make receiving orders and adjudications thereon, (b) To hold the public examination of debtors, (c) To grant orders of discharge where the application is not opposed, (d) To approve compositions or schemes of arrangement when they are not opposed, (e) To make interim orders in any case of urgency,

REGISTRARS IN BANKRUPTCY (*cont.*).

(f) To make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in chambers, (g) To hear and determine any unopposed or *ex parte* application, (h) To summon and examine any person known or suspected to have in his possession effects of the debtor or to be indebted to him, or capable of giving information respecting the debtor, his dealings or property (*ib.*, ss (2))

As to what may be done in chambers, see R 6 A registrar may, under the general or special direction of the judge, hear and determine any matter mentioned above (R 7) These rules are set out and elaborately explained in *Williams*, pp 419-421

High Court Registrars also have power to grant orders of discharge and certificates of removal of disqualifications, and to approve compositions and schemes of arrangement

A registrar has no power to commit for contempt of court (ss (4))

The Lord Chancellor may from time to time by order direct that any specified registrar of a county court shall have and exercise all the powers of a bankruptcy registrar of the High Court (ss (5))

(b) **Superannuation of, etc** The registrars, clerks, and other persons holding their offices at the passing of this Act who may be continued in their offices, shall, on their retirement therefrom, be allowed such superannuation as they would have been entitled to receive if this Act had not been passed, and they had continued in their offices under the existing Acts (B A , 1883, s 158)

RELATION BACK. (See Title of Trustee.)

RELEASE OF DEBTS

Debts provable in bankruptcy are released by an order of discharge (see *Discharge of Bankrupt*, p 128)

The debts of a man who compounds with his creditors are to some extent released (see *Composition or Scheme of Arrangement*, p 85). A deed of arrangement usually contains a clause providing for the release of the debts due to the creditors who are parties to the deed (see *Deed of Arrangement*, p 118)

RELEASE OF TRUSTEE (See Trustee)

REMOVAL OF TRUSTEE (See Trustee, p 321 , and see Rs 301-303)

• **REMOVING GOODS.** (See Control over Person and Property of Debtor, p. 92)

REMUNERATION.

• As to remuneration of special manager, see *Manager*, p 191.

• As to remuneration of the trustee, see *Trustee*, p 323 , and as to voting as to trustee's remuneration, see *Meetings of Creditors*, p 324

Where the official receiver employs a person to assist the debtor in preparation of affairs, he specifies to the Board of Trade the amount of remuneration (R 326)

RENT. (See Landlord and Tenant)

REPORT.

The Board of Trade makes an annual report to Parliament on all judicial and financial matters relating to bankruptcy (s 131, Rs 282-284) The Board must cause a report to be prepared on the accounts of a trustee who is applying for release (see s 82 (1), and *Trustee*, p. 321)

As to the official receiver's report on a composition, see *Composition or Scheme of Arrangement*, p 82 , and as to his report on application for discharge, see *Discharge of Bankrupt*, p 123

REPUTED OWNERSHIP (See also Order and Disposition ; Property Divisible amongst Creditors ; and Property not Divisible Amongst Creditors)

- (a) *Generally*, p 270
- (b) *Text of the clause*
- (c) *Policy of the law.*
- (d) *The doctrine not new*
- (e) " *Goods*," p 271.
- (f) " *In his trade or business* "
- (g) " *Possession, order, or disposition* "
- (h) *How possession of bankrupt ended*
- (i) " *The commencement of the bankruptcy*," p 272
- (j) " *Consent of the true owner* "
- (k) *Question of consent one of fact*
- (l) *Usages and customs of trade*, p 273.
- (m) *Goods entrusted to factor , on sale or return, etc*
- (n) *Trade debts due or growing due*, p 274
- (o) *What are " things in action,"* p. 275
- (p) *Goods comprised in bill of sale*

REPUTED OWNERSHIP (*cont.*), (*index*, p 269)

(a) **Generally** It has been pointed out that all property belonging to or vested in a bankrupt at the commencement of the bankruptcy, and all goods in his order or disposition, are divisible amongst his creditors (see *Property Divisible amongst Creditors*, p 241) It is important, however, to clearly understand what is meant by "order and disposition"

(b) **Text of the clause.** S 44 (iii) of the B A , 1883, provides that the following shall be divisible amongst the creditors of a bankrupt —

"All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section" (As to the proviso, see *par (n)*, *post*)

Every word of this section is important

In order that property in the possession of the bankrupt which is not his own, may become divisible under the reputed ownership clause, the following conditions must therefore be fulfilled (1) The goods must be in his possession, order, or disposition, in his trade or business, at the commencement of the bankruptcy, (2) He must be the reputed owner, (3) The true owner must consent

(c) **Policy of the law :** The policy of the law has been thus tersely expressed "If goods are in a man's possession, order, or disposition under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have given the credit" *Ex p Wingfield, In re Florence*, 1879, 10 Ch D 591 It is noteworthy that if a man lose his goods through the operation of this section, he may prove against the estate of the bankruptcy in respect of the loss so caused (*In re Button, Ex p Haviside*, 1907, 23 T L R 422)

(d) **The doctrine not new** The doctrine of reputed ownership is of considerable antiquity In Mr Green's "Spirit of the Bankruptcy Laws," 1769, it is written "Commissioners in bankruptcy may sell all goods whereof the bankrupt shall be reputed owner, and,

REPUTED OWNERSHIP (*cont.*), (*index*, p 269)

with the consent of the true owner, shall take upon him the sale and disposition, though formerly conveyed by the bankrupt to such true owner for valuable consideration "

* (e) "Goods" "Goods" include all chattels personal (s 168), but do not include lands, or interests in lands, houses, or things affixed to the freehold (*Horn v Baker*, 1808, 9 East 215) Thus heirlooms and growing crops are not included (*Williams*, p 218, see also *Trade Debts*, *par* (n) *post*)

(f) "In his trade or business" The words "in his trade or business" have been defined by Lindley, L J, to mean not merely "visibly employed in his trade or business, but acquired for the purposes of the business and used for these purposes" (*Colonial Bank v Whimney*, 1886, 30 Ch D 261), at p 281

(g) "Possession, order, or disposition" . Goods must be in the sole possession of the bankrupt So, where one of two partners becomes bankrupt, partnership property is not within the section (*Ex p Dorman, In re Lake*, 1872, L R 8 Ch 51) Furniture settled on his wife, of which a bankrupt husband has joint possession, is not in his reputed ownership (and see s 10 of the Married Women's Property Act, 1882) Actual possession is not necessary Thus the bankrupt may possess by a servant, a lessee, or a carrier As a general rule goods are not in the order and disposition of a debtor, when they are in the possession actual or constructive of a creditor who is entitled to a lien on them (*Greening v Clark*, 1825, 4 B & C 316, *Webb v Whimney*, 1868, 18 L T 523)

Goods properly in the possession of the sheriff (*Fletcher v Manning*, 1844, 12 M & W 571), and goods seized by a bailiff under a distress (*Sacker v Chidley*, 1865, 11 Jur N S 654), are not in the possession of the bankrupt

(h) How possession of bankrupt ended Where goods have been in the possession of the bankrupt, it is necessary in order to determine that possession to deliver actual or symbolical possession to the true owner (see *Manton v Moore*, 1796, 7 T. R 67)

The taking possession of part of the goods amounts to a withdrawal of consent as to the whole (*In re Eslick, Ex p Phillips*, 1876, 4 Ch D 496).

(i) "The commencement of the bankruptcy" . The bankruptcy

REPUTED OWNERSHIP (*cont.*), (*infra*, p 269)

commences at the time of the act of bankruptcy being committed on which a receiving order is made (B A, 1883, s 43)

(j) "Consent of the true owner" . There must be a true owner, and he must consent . The person who consents must not be the person in possession . The person who is entitled to determine the appearance of beneficial interest is the true owner . His may be a legal or equitable interest (*Ex p Union Bank of Manchester, In re Jackson*, 1871, L R 12 Eq 354)

Where a building contract provided that all loose materials and plant brought on the land should be deemed to be annexed to the freehold, the building owner was held to be true owner (cf *In re Keen & Keen, Ex p Collins*, 1902, 1 K B 555)

A *cestui que* trust often acts so as to make the possession of the trustee the possession of a reputed owner under the section (*Ex p Moore*, 1842, 2 M D & D 616)

As to property of a landlord in the reputed ownership of his tenant, see *Landlord and Tenant*, p 187

(k) Question of consent one of fact . The question whether the true owner consents is one of fact to be determined in each case (Williams, p 277) . He must have knowledge of the bankrupt's possession (*Ex p Ford, In re Caughey*, 1876, 1 Ch D 521) and capacity to consent . Thus an infant cannot consent (*In re Mill's Trusts*, 1895, 2 Ch 564) . A demand of possession made on the bankrupt by the true owner previous to an act of bankruptcy is sufficient to prevent the operation of the statute, and this seems to be the case even though the demand did not reach the bankrupt, or was not complied with until after he had committed an act of bankruptcy (*Ex p Ward, In re Coulston*, 1872, L R 8 Ch 144), and although the demand is made in consequence of a suspicion of insolvency (*Ex p Montagu, In re O'Brien*, 1876, 1 Ch D 554) . The fact that the true owner makes every attempt to get the property from the bankrupt appears to be sufficient (*Ex p National Guardian Co, In re Francis*, 1878, 10 Ch D 408)

In *In re Watson*, 1905, 2 K B 753, it was held that in order that goods may be "in the order," etc, with the consent, etc, the real owner must have consented to a state of things from which, had he considered the matter, he must have known that the inference

REPUTED OWNERSHIP (*cont*), (*index*, p 269)

of ownership by the bankrupt must arise In that case a firm of foreign bankers, shipping, and commission agents had in their possession at the date of their bankruptcy certain silver and plated articles, the property of A & Co, silversmiths These articles were sent as samples to be exhibited in cases in the bankrupt's offices, and a list of the trade prices was sent with them They were not to be sold below those prices The samples were held not to be within the "order and disposition of the bankrupts"

(l) Usages and customs of trade Usages of trade have an important bearing on the question of consent It is obvious that where a man has the goods of other persons in his possession in the ordinary course of trade no creditor is deceived Thus, to take a simple instance, a wharfinger or warehouseman is well known to be a bailee of goods for hire There are many cases near the line Where the debtors were agents for sale and described themselves as "merchants' and manufacturers' agents," they were not reputed owners (*Ex p Bright, In re Smith*, 1879, 10 Ch D 566) Again, an unfinished ship was held not to be within the section (*Woods v Russell*, 1822, 5 B & A 942)

Custom to be universal In order to avail the creditor the custom or usage must be one known generally, and not merely to traders in a particular market (*In re Goetz, Jonas & Co*, 1898, 1 Q B 787) Thus while the custom of hotel keepers as to hiring furniture has been judicially recognised (*Crawcom v Salter*, 1881, 18 Ch D 30), the court has declined to recognise the custom of hiring furniture generally, so as to protect a man who sells furniture to a householder on the hire purchase system (*Ex p Powell, In re Matthews*, 1875, 1 Ch D 501) Customs have been set up in the following trades, etc boarding-house keeper, coach builder, clock maker, bookseller, farmer, wine merchant, furniture dealer, ironmonger, piano hiring, horse dealer (see *Williams*, p 229) The mere fact that the name of the true owner is printed on the goods does not take them out of or bring them within the operation of the section (see *Lingard v Messiter*, 1823, 1 B & C 308)

(m) Goods entrusted to factor, on "sale or return," etc. In general, goods entrusted to the bankrupt for any ordinary legitimate purpose are not in his reputed ownership So goods entrusted to a factor (*Mace v. Cadell*, 1774, Cowp 232), or bills remitted to a

REPUTED OWNERSHIP (*cont.*), (*infra*, p. 269)

banker (*Ex p. Dumas*, 1754, 1 Atk. 232), will not pass to a trustee in bankruptcy. It would seem that goods sent on "sale or return" or "on approval" would not, at the present day, be held to be in the order and disposition of bankrupt (see *Williams*, pp. 230, 231).

(ii) "Trade debts due or growing due." Although choses in action are generally excluded, one class of choses in action is expressly brought within the section. Thus, "debts due or growing due to the bankrupt in the course of his trade or business" are within the doctrine of reputed ownership. All debts due to the bankrupt during the period of his trading are not necessarily debts due in the course of his trade (per Bacon, C. J., *In re Pryce*, *Ex p. Rensburg*, 1877, 4 Ch. D. 685).

In *Cooke v. Hemming*, 1868, L. R. 3 C. P. 334, affords a good example of a trade debt. In that case a person who having contracted to supply an asylum with meat for six months, to be paid for within a certain time after delivery of the meat, before any of the meat had been delivered assigned the contract to a butcher, who alone supplied the meat to the asylum in the name of the original contractor and under his contract. The original contractor afterwards became bankrupt. It was held that the debt due from the asylum was within the order and disposition of the original contractor, and therefore that the benefit of it passed to his trustee. The expression "debts due" includes debts which are only contingent at the commencement of the bankruptcy (*Ex p. Kemp*, *In re Fastledge*, 1874, L. R. 9 Ch. 383).

Trade debts are therefore liable to pass to his trustee, although he may have assigned them away. Although, from the absence of notice, consent of the owner may be inferred, the inference will be rebutted if the true owner takes every possible step to obtain possession of the debt or his failure to do so is not his fault (*Ryall v. Rolle*, 1749, 1 Ves. 348, and see *Rutter v. Everett*, 1895, 2 Ch. 872, where all the cases are reviewed). An assignee of a trade debt should therefore make the assignment known at once to the debtor. But notice is not necessary if that debtor has knowledge. The knowledge must be such that, after acquiring it, the person owing the debt would be guilty of a breach of trust if he paid, by direction of the assignor, adversely to the right of the assignee (*Ex p. Agia Bank*, *In re Worcester*,

REPUTED OWNERSHIP (*cont.*), (*index* p 269)

1868, L R 3 Ch 559) The notice should be such as would prevent the assignee from paying or taking a valid discharge from anyone but the party giving the notice

* (a) What are things in action. Inasmuch as choses in action (with one important exception, see *Trade Debts, supra*) are excluded, it is necessary to consider the meaning of that term. Shares in a company (*Colonial Bank v Whimney*, 1886, 11 A. C 426), a share in the assets of a partnership (*In re Bainbridge, Ex p Fletcher*, 1878, 8 Ch D 218) and debentures (*In re Pryce Ex p Rensburg*, 1877, 4 Ch D 685) are choses in action. So are annuities, policies of insurance and stock in the public funds

(b) Goods comprised in bill of sale. As to the order and disposition of goods comprised in a bill of sale see *Order and Disposition* p 212

RESCISSION OF RECEIVING ORDER. (See *Annulment of Order*, p 263)

RESIDENCE OF DEBTOR. (See *Courts*, p 98)

RULES.

(a) Bankruptcy rules. The Lord Chancellor may from time to time, with the concurrence of the President of the Board of Trade, make, revoke and alter general rules for carrying into effect the objects of the Act of 1883 (1883, s 127 (1))

All general rules so made must be laid before Parliament within three weeks after they are made if Parliament is then sitting, and if Parliament is not then sitting, within three weeks after the beginning of the then next session of Parliament, and are judicially noticed and have effect as if enacted by the Act (*ib.*, (2))

General rules, so made, revoked or altered, cannot extend the jurisdiction of the court (*ib.*, (4))

No general rule comes into operation until the expiration of one month after the same has been made and issued (*ib.*, (5))

(b) Rules generally: The principal sets of rules which readers of this work are likely to consult are as follows —

(1) The Bankruptcy Rules, 1886 and 1890; The Bankruptcy Rules 1891, The Bankruptcy Rules 1896

(2) County Court Rules (as to judgment debtors)

RULES (*cont.*).

- (3) Deeds of Arrangement Act Rules, 1887-1888, and 1890
- (4) Administration Order Rules, 1881
- (5) Bills of Sale Rules, 1883

SALARY (and see Realisation of Property)

(a) Appropriation of portion of A portion of a bankrupt's salary, provided it is a salary to which he has a legal or equitable claim (*Ex p Wicks*, 1881, 17 Ch D 70), and is not a mere voluntary allowance (*Ex p Webber*, 1886, 18 Q B D 111), may be appropriated for his creditors (see *Realisation of Property*, p 260)

(b) Preferential payment of certain salaries. See *Priority of Debts*, p 232

SALE

(a) Of bankrupt's property by trustee See *Trustee*, p 329 The bankrupt himself may be the purchaser (*Kitson v Hardwick*, 1872, L R 7 C P 473), but a member of the committee of inspection must get leave to purchase (see *Committee of Inspection*, p 76) Where the sale is effected by an auctioneer, he must pay over the gross proceeds to the trustee, and subsequently send in his bill (R 295)

(b) By sheriff As to what constitutes a "sale" by the sheriff, see *Acts of Bankruptcy*, p 18

(c) Under execution As to sale of goods under execution, see *Sheriff*, p 294

SANITARY AUTHORITY (See Disqualifications of Bankrupt)

SAVINGS BANK ACT, 1863 (See Priority of Debts)

SCALE OF SOLICITOR'S COSTS

- I *Petitioning debtor's solicitor's bill of costs*
- II *Petitioning creditor's solicitor's bill*, p 278
- III *Special costs*, p 281
- IV *Taxation of petitioner's costs*, p 282
- V *Debtor's solicitor's costs*
- VI *Miscellaneous and general costs*, p 283
- VII *General regulations*, p 285

I Petitioning debtor's solicitor's bill of costs —

1 *In Summary Cases under Section 121*

(a) Where the assets are certified as not likely to realise £100 —
Instructions for petition, search for prior petition, drawing and

SCALE OF SOLICITOR'S COSTS (*cont*)

	£	s	d
attesting petition, attending presentation and hearing thereof, attending official receiver with deposit, on giving him all necessary information after order made, and upon preliminary examination of debtor, attending public examination, drawing bill of costs, obtaining appointment to tax, and copy notice of and attendance at taxation (exclusive of court fees and other proper disbursements)	3	0	0
Preparing order of adjudication on application of debtor under Rule 190	0	10	0
(b) Where the assets are certified as likely to realise more than £100, but not to exceed £200 —			
Instructions for petition, search for prior petition, drawing and attesting petition, attending presentation and hearing thereof, attending official receiver with deposit, on giving him all necessary information after order made, and upon preliminary examination of debtor, attending public examination, drawing bill of costs, obtaining appointment to tax, and copy notice of attendance at taxation (exclusive of court fees and other proper disbursements)	4	0	0
Preparing order of adjudication on application of debtor under Rule 190	0	13	4
The costs under these two heads (a) and (b) will not be liable to reduction under Rule 112			
(c) Where the assets are certified by the official receiver as likely to realise more than £200, but not to exceed £300, three-fifths of the following charges, in accordance with the provisions of Rule 112, shall be allowed			

2 In Non-Summary Cases

Instructions for petition —

Where the assets are certified—

As not likely to yield £500	3	3	0
As likely to exceed £500, but not to exceed £1,000	4	4	0
" " £1,000, " " £2,000	5	5	0
" " £2,000, " " £3,000	6	6	0
" " £3,000, " " £4,000	7	7	0
" " £4,000, " " £5,000	8	8	0
" " £5,000, " " £7,500	9	9	0
" " £7,500, " " £10,000	10	10	0
" " £10,000, then the fee shall be increased by one guinea for every additional £2,500, or fraction of £2,500 beyond the first £10,000			

A certificate of the official receiver as to the value which the assets are likely to realise shall be produced to the taxing officer, and the allowance for instructions for petition made in accordance therewith

If the assets realise more than the amount certified by the official receiver, the fees may be calculated accordingly and the additional percentage shall be recoverable out of any assets available after payment of all costs, charges and fees, if claimed in writing before the assets have been distributed by the trustee and if the assets realise less than the amount so certified the excess of percentage shall be disallowed, and if paid shall be repaid to the trustee

SCALE OF SOLICITOR'S COSTS (*cont*).

	£	s	d
In cases where a composition is accepted and confirmed by the court, the value of the assets shall be taken at the amount payable to the trustee or otherwise required for the purposes of composition			
Search for prior petition	0	6	8
Drawing and attesting petition	0	13	4
Attending official receiver with deposit	0	6	8
Attending presentation and hearing of petition	0	10	0
Drawing receiving order and copy and attending passing	0	10	0
Preparing order of adjudication on application by debtor under Rule 190	1	0	0
Attending official receiver on receiving order being made, and giving him all necessary information	0	13	4
Letters, messengers, etc	0	6	0

3 *Debtor's Solicitor's Costs on consenting to a Receiving Order on Creditor's Petition*

Instructions for and drawing consent to receiving order (if a receiving order is made by consent within five days after service of petition) —

Where the assets are certified by the official receiver —

As not likely to realise £500	1	1	0
As likely to exceed £500, but not to exceed £1,000	1	11	6
" " £1,000, " " £2,500	2	2	0
" " £2,500.	3	3	0

Preparing order of adjudication on application by debtor under Rule 190	1	0	0
Attending official receiver on receiving order being made, and giving him all necessary information	0	13	4
Letters, messengers, etc	0	6	0

The charges under this paragraph shall not be allowed in cases falling under paragraph 1 (a) and (b)

4 *Debtor's Solicitor's Costs on filing a Declaration of Inability to Pay*

Instructions for drawing and attesting declaration of inability to pay, including affidavit of identity of debtor (where requisite)	0	13	4
Attending filing	0	6	8

The charges under this paragraph shall not be allowed in cases falling under paragraphs 1, (a) and (b), or if the debtor subsequently files his own petition

The expense of an assignment shall not be allowed where a declaration of inability would answer the purpose

II Petitioning creditor's solicitor's bill of costs —

1 *Where the Act of Bankruptcy is Non-compliance with a Bankruptcy Notice*

	£	s	d
Instructions for and preparing notice, and preparing request to issue	0	13	4
Attending filing	0	6	8
Notice and two fair copies	0	6	8
Attending sealing notice and copies	0	6	8
Service of notice	0	5	0
Affidavit of service of notice (where necessary) and attending swearing	0	6	8
Attending court on hearing of notice and drawing order	0	13	4

SCALE OF SOLICITOR'S COSTS (*cont.*).

	£	s	d
1 If the debtor sets up a counter-claim or otherwise disputes the validity of the notice, all necessary charges in addition to the foregoing shall be allowed for perusals of affidavits, affidavits in reply or procuring <i>viva voce</i> evidence, and where it is necessary to instruct counsel, the usual charges for brief and counsel's fees shall be allowed			
2 <i>Proceedings on Petition</i>			
Instructions for petition	1	0	0
Examining particulars of petitioning creditor's account	0	6	8
If the act of bankruptcy is default made upon a bankruptcy notice issued by the solicitor to the petitioner, this last charge shall not be allowed			
Where the act of bankruptcy arises under sub-sections 1 <i>a</i> , <i>b</i> , <i>c</i> , <i>d</i> , <i>e</i> , or <i>h</i> of section 4 of the Act, special attendances (where necessary) to examine witnesses as to the facts they can prove shall be allowed, the charges for which, and for summoning witnesses, or for affidavits, shall be in the discretion of the taxing officer according to the circumstances, and where it is necessary to instruct counsel to support the petition, the usual charges for brief and counsel's fees shall be allowed			
Search for prior petition	0	6	8
If the solicitor resides at a distance —			
Writing agent to search for prior petition	0	3	6
Agent's writing result of search	0	3	6
Drawing bankruptcy petition	0	10	0
Engrossing, where the petition exceeds 7 folios, per folio	0	0	4
Attesting signature of each petitioning creditor, except where petitioners are in partnership	0	6	8
Where petitioning creditor is a company or corporation with seal	0	13	4
Drawing and fair copy affidavit verifying petition	0	3	4
Attending petitioner to be sworn	0	6	8
Two copies of petition for sealing, per folio	0	0	4
Preparing subpoena and serving witnesses, or arranging with witnesses for their attendance on presentation of petition when necessary	0	13	4
Payment of witnesses (<i>see</i> Scale in No VI)			
The petitioning creditor shall not be regarded as a witness, he shall not be paid for loss of time, but shall be allowed his expenses of travelling and subsistence			
Attending official receiver with deposit	0	6	8
The amount of deposit is to be charged in the petitioning creditor's bill of costs			
Attending on presentation of petition and investigation of the statements therein by the court, and for clerk	1	0	0
Attending by agent	2	0	0
Where the solicitor resides at a distance from the court, his travelling expenses may be allowed, provided the total charge does not exceed costs of attendance by agent			
Drawing order for hearing petition	0	3	4
Service of petition (<i>see</i> Scale in No VI)			
Affidavit as to act of bankruptcy, including drawing and attending swearing	0	6	8
Affidavit of petitioner's debt, including drawing and attending swearing	0	6	8

SCALE OF SOLICITOR'S COSTS (*cont.*).

s £ s d

Where the debtor consents to an immediate receiving order, and does not employ his own solicitor —

Drawing and attesting consent, including affidavit of identity (when requisite) —

Where the assets are certified—

As not likely to realise £500

1 1 0

As likely to exceed £500, but not to exceed £1,000

1 11 6

As likely to exceed £1,000, but not to exceed £2,500

2 2 0

As likely to exceed £2,500

3 3 0

Attending court on hearing petition

1 0 0

Attending by agent

2 0 0

Drawing receiving order and copy and attending passing

0 10 0

Attending official receiver after receiving order made, and giving him all necessary information

0 13 4

More than one attendance at the presentation or hearing of a bankruptcy petition shall not be allowed unless ordered and certified by the court at the time

Attending court where adjournment ordered

0 13 4

Attending by agent

1 0 0

Instructions for appointment of interim receiver

0 13 4

Drawing and copy application

0 5 0

Instructions for necessary affidavits in support, each

0 6 8

Drawing same, per folio

0 1 0

Fair copy, per folio

0 0 4

Attending deponents, each

0 6 8

Attending filing affidavits

0 6 8

Attending court on hearing application

1 0 0

Attending by agent

2 0 0

Drawing order in duplicate and attending to pass

0 6 8

Attending official receiver with order, paying deposit, and giving all necessary information

0 13 4

Letters, messengers, etc (in discretion of taxing officer)

3 *Costs for Substituted Service where the Debtor keeps out of the way to avoid Service*

Preparing and making application to the court for substituted service, including previous attendances to serve which have been without effect because the debtor was keeping out of the way and could not be personally served (inclusive charge)

0 15 0

Drawing affidavit of facts, showing that due pains had been taken to effect personal service, per folio

0 1 0

Fair copy of affidavit, per folio

0 0 4

Attending to swear and file affidavit and to obtain order for substituted service and drawing up order

0 13 4

4 *Where the Debtor disputes the Statements in the Petition*

Attending petitioner where the debtor has served notice of disputing the statements in the petition

0 6 8

Special attendances shall be allowed to examine witnesses as to the facts they can prove, the charges for which, and for summoning witnesses, shall be in the discretion of the taxing officer, according to the circumstances, and where it is necessary to instruct counsel to support the petition, the usual charges for brief and counsel's fees shall be allowed

Attending court when the receiving order is made

1 0 0

Attending by agent

2 0 0

SCALE OF SOLICITOR'S COSTS (*cont*)

	£	s	d
5 <i>Where the Debtor is required by the Court to enter into a Bond</i>			
Attending to make enquiries as to sufficiency of sureties	0	13	4
This charge shall be subject to increase, according to the distance of the sureties' residence, and, where necessary, agency charges for making such enquiries shall be allowed			
Drawing exceptions to sureties	0	3	4
Service thereof on debtor's solicitor	0	5	0
Attending court when sureties allowed or disallowed	0	13	4
The costs of the affidavits in opposition to the allowance of the bond for want of sufficiency of sureties shall be the same as of other special affidavits			

III Special costs.—

Instructions for appointment of a special manager	0	13	4
Drawing and copy application	0	5	0
Instructions for affidavits in support, not exceeding three in number, unless the taxing officer considers that further affidavits were necessary, each	0	6	8
Drawing same, per folio	0	1	0
Fair copy, per folio	0	0	4
Attendances on deponents, each	0	6	8
Attending official receiver to lodge papers, and to obtain appointment to hear application	0	6	8
Attending official receiver on hearing application	0	13	4
Proper charges for further attendances on creditors and other work necessarily done by a solicitor in connection with the appointment of a special manager shall be allowed, but no costs shall be allowed on an unsuccessful application unless the official receiver shall certify that the costs of the application should be allowed			
Attendance at public examination where the court thinks such attendance necessary	1	1	0
The following costs subsequent to receiving order may also be allowed upon a certificate in writing of the official receiver that the attendance was necessary in the interest of the estate, and shall not be exceeded unless specially authorised by him —			
Attending official receiver upon preliminary examination of debtor	0	13	4
Attendance at first meeting of creditors	0	13	4
The petitioning creditor's solicitor may be allowed all proper charges at the rate specified in the scale for all work necessarily or usefully done in the interests of the creditors generally for the protection or benefit of the estate between the presentation of the petition and the date of the receiving order, if the official receiver shall certify that the work done was necessary or useful. Such certificate may be given by the signature of the official receiver to a memorandum containing such certificate at the foot of the bill of costs			
In exceptional cases where the petitioning creditor's solicitor has prior to the presentation of the petition rendered special services in the interests of the creditors generally, and such services shall have assisted to preserve or increase the assets, or otherwise been of substantial advantage to the estate, the taxing officer may, upon a certificate signed by the official			

SCALE OF SOLICITOR'S COSTS (*cont*).

receiver to that effect, which may be given by a memorandum containing such certificate at the foot of the bill of costs, allow all proper charges for such services at the rate specified in the scale

Where the official receiver employs the petitioning creditor's solicitor or the debtor's or other solicitor to take any steps for the protection or benefit of the estate or in other matters not included in the foregoing scale, the costs of work done under such employment shall, in the absence of any special agreement with the official receiver, be subject to taxation under Scale No VI

*[Where the solicitor to the petitioning debtor resides at a distance there shall be allowed in addition to the items specified in No 1 of the scale for the attendance on presentation of the petition either by the solicitor or by an agent such sum as the taxing officer thinks reasonable, not exceeding —

In summary cases

0 12 0

In other cases

1 0 0

The allowance in summary cases shall not be subject to any reduction under Rule 112 (2)]

IV. Taxation of petitioner's costs :—

Drawing bill of costs and copy, and notice of and attendance at taxation —

On debtor's petition

0 15 0

On creditor's petition (when costs do not exceed £10)

0 15 0

With an additional allowance where costs exceed £10 of 5 per cent. on the amount of the bill, provided that the total fee shall not exceed £5

No charges, except those included under the preceding scales, shall be allowed in the case of a debtor's petition or unopposed creditor's petition, unless in the latter case the taxing officer considers that for special reasons additional items may be allowed

Where the petition is opposed, costs may be allowed in addition for necessary matters, not provided for under the preceding scales or under Scale No VI, such allowances shall be made in conformity with that scale as nearly as may be or with the scales of costs in the Supreme Court, according to the nature of the proceeding

V. Debtor's solicitor's costs .—

1. *Where the Court allows Costs to the Debtor on a Bankruptcy Notice being set aside*

	£	s	d
Instructions to apply to set aside bankruptcy notice	0	6	8
Perusing and considering bankruptcy notice	0	5	0
Instructions for affidavit of counter-claim	0	6	8
Drawing same, per folio	0	1	0
Fair copy, per folio	0	0	4
Attending to file, and drawing application for appointment to hear and notice	0	6	8

Costs of further affidavits, or of procuring *viva voce* evidence, and of other incidental charges properly incurred, including where necessary usual charges for brief and fees to counsel, shall be allowed in the discretion of the taxing officer

* The words in brackets were added by the Rules of 1896

SCALE OF SOLICITOR'S COSTS (cont.).

	s.	d.
Attending court on application —		
If heard	1	1 0
If adjourned	0	10 6
Drawing order and copy, and attending to pass ..	0	6 8
Letters, messengers, etc. (in discretion of taxing officer)		
The debtor's personal expenses for travelling and loss of time shall be allowed according to the scale for witnesses		
2. <i>Warrant of Court as to Costs to the Debtor or to the Debtor's Petitioner</i>		
Attending debtor served with copy of petition and taking instructions to show cause	0	6 8
Drawing notice to show cause	0	5 0
Two fair copies for service	0	2 0
Attending filing	0	6 8
Service on creditor, including postage	0	2 6
Service on creditor's solicitor	0	2 6
Perusing and considering petition	0	6 8
Special attendances shall be allowed to examine witnesses as to the facts they can prove, the charges for which and for summoning witnesses shall be in the discretion of the taxing officer according to the circumstances, and where it is necessary to instruct counsel, the usual charges for brief and counsel's fees shall be allowed.		
Attending court on petition —		
If heard	1	1 0
If adjourned	0	10 6
Drawing order and copy, and attending to pass	0	6 8
Letters, messengers, etc. (in discretion of taxing officer)		
The debtor's personal expenses for travelling and loss of time shall be allowed according to the scale for witnesses		

VI. Miscellaneous and general costs:—

1. <i>Contempt—Duty of Admonition re: failure to comply with Order</i>		
	s.	d.
Attendance in court	0	15 —
Drawing order and passing	0	6 8
Attending counsel	0	6 8
Notice to witnesses each	0	2 6
Payment to witnesses (see scale below)		
2. <i>Warrants</i>		
Warrant, warrant of seizure, or search warrant	0	7 0
And if more than four folios for each folio beyond four	0	1 4
3. <i>Service</i>		
Service of petition, order, notice, or other process each service	0	5 0
If the distance be more than two miles, 1s per mile on such further distance, or a sum, in the discretion of the taxing officer, according to circumstances		
Service by post, including postage	0	2 6
Special service under an order (in discretion of taxing officer)		
In cases of great distance the service shall be by agent, unless otherwise sanctioned.		
4. <i>Interdicts</i>		
For statement of facts, or special case for the opinion of the court, Judge, or Registrar	0	15 4
For record for trial	0	15 4

SCALE OF SOLICITOR'S COSTS (*cont.*).

	£	s	d
For motion	0	6	8
For motion on appeal	0	13	4
For any proceeding or application not otherwise provided for	0	6	8
For application for directions	0	6	8
For application for substituted service	0	6	8
To appear on hearing of a matter under Rule	0	13	4
For special affidavits	0	6	8
For proposal for scheme of arrangement or composition	0	6	8
For case of opinion of counsel	0	6	8
For brief on hearing, trial, or determination of any petition, issue of fact, special case, or motion other than an interlocutory motion before the court or a judge or a registrar of the High Court	1	1	0
For such brief and for brief on hearing of an appeal, when witnesses are to be examined or cross-examined, such fee may be allowed as the taxing officer shall think fit, having regard to all the circumstances of the case, and to other allowances (if any) for attendances on witnesses and procuring evidence			
For brief on hearing of any interlocutory motion (or such further sum as the taxing officer may allow)	0	6	8
For brief on any other proceeding not otherwise provided for, such fee as the taxing officer may allow			

5 *Drawing Documents*

Commission or order for examination of witnesses abroad, per folio	0	1	0
Other orders where necessary, per folio	0	1	0
Proposal for scheme of arrangement or composition, per folio	0	1	0
Application for an appointment before a judge or registrar, and copy	0	5	0
Briefs and cases for opinion of counsel, per folio	0	1	0

6 *Perusals*

Of notice of motion by the solicitor of the party on whom the same is served	0	6	8
Or, if exceeding 20 folios, per folio	0	0	4
Of documents (by London agent) on an appeal	1	1	0
	10		
Of affidavits, depositions, and exhibits by the solicitor of the party against whom the same can be read, per folio	0	0	4
Of other documents where necessary, per folio	0	0	4

7 *Attendances*

At court on a pplication to prosecute a petition in a particular district, or to transfer petition from one district to another	0	13	4
On application for directions	0	13	4
At court on application for warrant, warrant of seizure, or search warrant	0	13	4
Instructing officer as to execution of warrant, warrant of seizure, or search warrant	0	6	8
To file affidavits	0	6	8
General attendances, each	0	6	8
Long and special attendances (or more, in the discretion of the taxing officer)	0	13	4
At meetings of creditors (other than first meetings) or of committees of inspection when duly authorised and necessary, per hour	0	10	0

SCALE OF SOLICITOR'S COSTS (*cont.*).

	£	s.	d.
8 <i>Letters, Telegrams, Etc</i>			
Writing letters, each, special	0	5	0
Ditto, common	0	3	6
• Circular letters, original letter, if special	0	5	0
Ditto ditto if common	0	3	6
For each copy thereof, including addressing and despatching, not exceeding 10 -	0	1	0
If above 10 in number, letters shall be printed, and there shall be allowed for each copy addressed and despatched in addition to printer's charges	0	0	6
Preparing and attending to despatch necessary telegrams	0	5	0

VII General regulations —

1 All costs, save as in this scale provided, which shall be properly incurred under the provisions of the Act or Rules, shall be allowed on the "Lower scale" in Appendix N to the Rules of the Supreme Court, 1883

2 In respect of business connected with sales, purchases, leases, mortgages, and other matters of conveyancing, and in respect of other business not being business transacted in court or in chambers, and not being otherwise contentious business, the solicitor's remuneration shall (in the absence of any agreement to the contrary) be regulated by the General Order under the Solicitors' Remuneration Act, 1881, for the time being in force, provided that, in cases of sales of mortgaged properties, the trustee's solicitor, if his remuneration shall be under Schedule 1 of the existing order, shall only be entitled to percentage upon so much of the proceeds of sale as shall not be chargeable by the mortgagee's solicitor with the percentage, and such percentage shall be payable only out of the proceeds of sale

3 All court fees and other proper disbursements shall be allowed in addition to the remuneration in this scale provided

4 Extra allowance for length of sittings, or other increased allowances not inconsistent with this scale, may be allowed, provided that any such allowance shall have been ordered and certified by the court at the time, or all such charges will be disallowed

5 Vouchers shall be produced on taxation for all payments, or such payments shall be disallowed

6 Bills of costs shall be written lengthwise on one side only, distinguishing, by insertion in separate columns, costs out of pocket from charges for work done and time expended. Dates shall be furnished to each item, but they must not be written in the margin, which shall be left clear for taxation

7 The fees allowed for drawing any affidavit or other document shall include any copy made for the use of the solicitor, agent, or for counsel to settle

8 No instructions for an affidavit shall be allowed when the solicitor or his clerk makes the affidavit

9 The allowances for instructions and drawing an affidavit in answer to interrogatories and other special affidavits, and attending the deponent to be sworn, shall include all attendances on the deponent to settle and read over

10 The fees allowed for delivery of documents, services, and notices shall not be allowed when the same solicitor is for both parties, unless it be necessary for the purpose of making an affidavit of service

11 The fees allowed for perusals shall not apply where the same solicitor is for both parties

12 Where the same solicitor is employed for two or more persons having the same interest, and separate papers are delivered, or other proceedings

SCALE OF SOLICITOR'S COSTS (*cont*)

had by or for two or more such persons separately, the taxing officer shall consider in the taxation of such solicitor's bill of costs either between party and party, or between solicitor and client whether such separate papers or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed.

13 A folio is to comprise 72 words every figure comprised in a column or authorised to be used being counted as one word.

14 In special cases where counsel are not instructed to appear in court and the solicitor acts as advocate a charge by the solicitor for the preparation of minutes of fact or evidence for his own use may be allowed, and in addition such special fee as the taxing officer may think fit, having regard to the nature and importance of the case and the questions involved.

15 As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who in the exercise of such discretion is to take into consideration other fees and allowances to the solicitor and counsel if any in respect of the work to which any such allowance applies, the nature and importance of the matter, the amount involved, the interest of the parties the estate or person to bear the costs, the general conduct and costs of the proceedings and all other circumstances.

16 Any person who may be dissatisfied with the allowance or disallowance by the taxing officer in any bill of costs taxed by him of the whole or any part of any items, may at any time before the certificate or allocatur is signed, carry in before the taxing officer an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the items or parts thereof objected to, and the grounds and reasons for such objection, and may thereupon apply to the taxing officer to review the taxation in respect of the same.

17 Upon such application the taxing officer shall reconsider and review his taxation upon such objection, and he may if he shall think fit receive further evidence in respect thereof, and if so required by the solicitor or any person interested, he shall state either in his certificate of taxation or allocatur or by reference to such objection the grounds and reasons of his decision thereon and any special facts or circumstances relating thereto.

18 Any person who may be dissatisfied with the certificate or allocatur of the taxing officer as to any item or part of an item which may have been objected to as aforesaid, may within fourteen days from the date of the certificate or allocatur or such other time as the court or judge or taxing officer at the time he signs his certificate or allocatur may allow, apply to the judge for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as the judge may think just, but the certificate or allocatur of the taxing officer shall subject to the provisions of the Bankruptcy Rules for the time being relating to the review of taxations at the instance of the Board of Trade where the taxation has been made by a registrar of a county court, be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.

19 Such application shall be heard and determined by the judge upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof unless the judge shall otherwise direct.

20 The allowances to witnesses in bankruptcy proceedings in the High Court shall be in accordance with those for the time being ordinarily made in other proceedings in the said court. In the County Courts such allowances shall be in accordance with the scale for the time being in force in the County Courts.

SCHEDULE

As to the requirements of a schedule to a bill of sale, see *Bills of Sale*, p 62

SCHEME OF ARRANGEMENT. (See Composition or Scheme of
• Arrangement)

SCOTLAND. (See Ireland and Scotland ; and Receiving Order,
p 263)

SEAL.

A corporation may act (in bankruptcy) by officer authorised under seal (1883, s 148)

Every court having jurisdiction in bankruptcy has a seal describing the court in such manner as may be directed by order of the Lord Chancellor Judicial notice is taken of the seal, and of the signature of the judge or registrar of any such court, in all legal proceedings (1883, s 137) Sealed copies of proceedings are received in evidence (*ib* , s 140)

SEARCH WARRANT. (See Realisation of Property)

SECRET ARRANGEMENT.

As to the effect of a secret arrangement between debtor and creditor on a composition, see sub tit *Composition or Scheme of Arrangement*, p 88

SECURED CREDITOR (See also Mortgaged Property)

(a) DEFINITION —

- (i) *Generally*
- (ii) *Mortgages, etc*
- (iii) *Where there is money in court*, p 289
- (iv) *Landlord*
- (v) *Execution creditor.*

(b) PETITION OF SECURED CREDITOR —

- (i) *Generally*
- (ii) *Estimate of security*
- (iii) *Whether trustee can redeem the security*, p 290
- (iv) *Creditor omitting to give up or estimate security*

(c) PROOF BY SECURED CREDITOR —

- (i) *Generally*
- (ii) *Where he does not realise or surrender*

SECURED CREDITOR (cont.).

- (iii) *Redemption of security*
- (iv) *Amendment of valuation*, p 291
- (v) *Courses open to secured creditor*
- (d) EFFECT OF ANNULMENT ON SECURITY
- (e) EFFECT OF SURRENDER OF SECURITY ON SUBSEQUENT INCUMBRANCES
- (f) VOTING OF SECURED CREDITORS, p 292
- (g) EFFECT OF RECEIVING ORDER ON SECURED CREDITOR
- (h) SECURED CREDITORS UNDER DEED OF ARRANGEMENT .

(a) DEFINITION —

(i) **Generally** The term “secured creditor” means a person holding a mortgage, charge, or lien on the property of the debtor (B A , 1883, s 168 (1)) It does not therefore include a person having security over the property of a stranger, nor does it include a joint creditor having security over the joint estate (*Ex p Peacock*, 1825, 2 Gl & J 27)

A judgment creditor who has obtained an order for the appointment of a receiver is not thereby made a secured creditor (*In re Dickinson, Ex p Charrington*, 1888, 22 Q B D 193) But where a defendant who pays money into court with a denial of liability, becomes bankrupt before the hearing, and his trustee admits the plaintiff's claim in part or in full, the plaintiff is to that extent a secured creditor (*In re Gordon, Ex p Navalchand*, 1897, 2 Q B 516) Again, in an action on a bill the defendant deposited money in court Before judgment the defendant became bankrupt The plaintiff was held to be secured (*Ex p Banner, In re Keyworth*, 1874, 30 L T 620)

(ii) **Mortgagees, etc** It is clear that a mortgagee would be a secured creditor within the meaning of the section, but a mere licence to seize affords no protection unless executed prior to the date of the act of bankruptcy to which the title of the trustee relates (*Cole v Kerriot*, 1872, L R 7 Q B 534) An assignment of property, however, gives the assignee a good title, and can be enforced against the trustee, unless it is void, because it contravenes the Bills of Sale Acts (see *Bills of Sale*)

An agreement to assign after-acquired property is valid in equity provided it is the intention of the parties, and is made clear by the

SECURED CREDITOR (*cont.*), (*index*, p 287)

assignment, that the assignee acquires an interest in the property as soon as the assignor acquires it (see *Holroyd v Marshall*, 1862, 10 H L C 191, *Reeve v Whitmore*, 1863, 33 L J Ch 63). To the extent, then, that his assignment is valid, an assignee may be said to be a secured creditor.

A charge on money already earned but not payable until after the assignor became bankrupt (*Ex p Moss, In re Toward*, 1884, 14 Q B D 310), and an assignment of instalments under a hiring agreement accruing after bankruptcy (*In re Davis & Co, Ex p Rawlings*, 1888, 22 Q B D 193), have been held good as against the trustee. But if the property assigned does not come into existence until after the bankruptcy, there is no security, and the assignee must prove in the bankruptcy (*Collyer v Isaacs*, 1891, 19 Ch D 342).

(iii) Where there is money in court. Where there is money paid into court in connection with cases between debtor and creditor, the creditor is secured to the extent of the amount paid in (see *In re Ford, Ex p the Trustee*, 1900, 2 Q B 211, and cases there cited).

(iv) Landlord. As to the position of a landlord, see s 42 of the B A, 1883, which is dealt with sub tit *Landlord and Tenant*.

(v) Execution creditor. With regard to creditors who have issued execution on the debtor's property, they are protected to the extent mentioned in s 45 (see *Execution Creditor*).

(b) PETITION OF SECURED CREDITOR —

(i) Generally. If the petitioning creditor is a secured creditor, he must, in his petition, either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated in the same manner as if he were an unsecured creditor (B A, 1883, s 6 (2)). The court will not restrain a secured creditor in the exercise of his legal remedies (*Ex p Hirst, In re Whealy*, 1879, 11 Ch D 273) and he may realise his security at any time even after receiving order (B A 1883, s 9, *ad inf*).

(ii) Estimate of security. The estimate need not be a true one,

SECURED CREDITOR (*cont.*) (*inter p.* 287)

Ex p. Taylor, In re Lacey 1881 13 Q. B. D. 128) and unless it can be said to be sham and unsubstantial the court ought not to enquire into its correctness (*In re Bullon*, 1905, 1 K. B. 602).

(iii) **Whether trustee can redeem the security** The trustee is not entitled to redeem the security at the value stated in the petition, the rules as to redemption (B. A. 1883, Sched. II, Rs. 11-13) only applying where the creditor has proved for the purpose of voting etc. (*In re Lamb, Ex p. Saffery*, 1899 2 Q. B. 549), (see par. (i), (ii) *supra*). A trustee to whom the security is given simply takes the creditor's place. He cannot alter the rights of prior or subsequent mortgages (*Cracknell v. Janssen* 1877 6 Ch. D. 735).

(iv) **Creditor omitting to give up or estimate security** A creditor who neither gives up nor estimates does not in the event of the debtor becoming bankrupt forfeit his security (*Moor v. Anglo-Italian Bank*, 1879, 10 Ch. D. 681), but in that case the petition will not be good (*ib. per Jessel, M. R.* p. 689) unless amended (*Ex p. Landornden In re Pogose* 1882 20 Ch. D. 289).

(c) PROOF BY SECURED CREDITOR

(i) **Generally** If a secured creditor, i.e., one who holds a mortgage or some other security realises his security, he may prove for the balance due to him after deducting the net amount realised but on surrendering his security to the official receiver or trustee for the general benefit of the creditors he may prove for the whole debt (B. A. 1883, Sched. II (9), (10)). A secured creditor must limit his proof to the amount due for principal and interest at the date of the winding up after deducting the proceeds of the realisation (*Quakermaid's Case*, 1892 1 Ch. 639).

(ii) **Where he does not realise or surrender** If a secured creditor does not either realise or surrender his security, he must before ranking for dividend give particulars of his security, and the value at which he assesses it. In this case he may only receive a dividend in respect of the balance due to him after deducting the assessed value (Sched. II (11)).

(iii) **Redemption of security** Where a security is so valued the trustee may redeem it on payment to the creditor of the assessed

SECURED CREDITOR (*cont.*), (*indiv.*, p 287)

value, and if he is dissatisfied with the assessed value, he may require the security to be sold by public auction (*ib* (12) (a) (b)) A creditor, however, may require the trustee to elect whether he will or will not exercise the power of redemption, and unless he makes his election to do so within six months he shall not be entitled to exercise it (*ib*, (c))

(iv) **Amendment of valuation:** A creditor may amend his valuation and proof on showing that they were made *bonâ fide* on a mistaken estimate, or that the security has diminished or increased in value. He must bear the cost of amending the valuation of his security and proof, unless the trustee allows the amendment without application to the court (Sched II (13)) It would seem, however, that if the trustee has actually elected to redeem, the creditor cannot amend his valuation (*Ex p Norris, In re Sadler*, 1886, 17 Q B D 728), (see also *In re Fanshawe*, 1905, 1 K B 170)

Where, upon amendment, the security is greater than as stated in the original estimate, the secured creditor must refund any surplus dividend he may have received. If the security is less than the original estimate, he is entitled to be paid out of moneys available in the hands of the trustee, but a dividend already paid cannot be disturbed (*ib*, (14))

(v) **Courses open to secured creditor** The following courses are open to a secured creditor (1) He may rely on his security and not prove at all, (2) He may realise his security and then prove for the balance, (3) He may surrender his security and then prove for the whole debt, (4) He may state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, if it be over property of the debtor

(d) **EFFECT OF ANNULMENT ON SECURITY** Where a secured creditor valued his security and proved for the balance after deducting the assessed value, the bankruptcy was annulled before the trustee had redeemed. It was held that the debtor could redeem upon paying the assessed value with interest (*Pearce v Bullard*, 1908, 24 T. L. R., 353)

(e) **EFFECT OF SURRENDER OF SECURITY ON SUBSEQUENT INCUMBRANCES** The effect of a first mortgagee giving up his security is simply to put the trustee in his place. It does not accelerate the

SECURED CREDITOR (*cont.*), (*index*, p 287)

rights of subsequent mortgagees (*Cracknall v Janson*, 1877, 6 Ch D 735)

(f) **VOTING OF SECURED CREDITORS** See *Meetings of Creditors*, p 197

(g) **EFFECT OF RECEIVING ORDER ON SECURED CREDITOR** As to this, see *Receiving Order*, p 263 For the manner in which secured creditors are entered in the statement of affairs, see *Statement of Affairs*, p 303

(h) **SECURED CREDITORS UNDER DEED OF ARRANGEMENT** As to the protection of a secured creditor under a deed of arrangement, see *Deed of Arrangement*, p 118

SECURITY (and see *Secured Creditor*)

For costs Bankruptcy is not a ground for ordering a plaintiff to give security for costs (*Rhodes v Dawson*, 1886, 16 Q B D 548)

A trustee bringing an action for the benefit of the estate need not give security (*Cowell v Taylor*, 1885, 31 Ch D 34) As to security for costs on appeal, see *Appeal*

To be by bond Where a person is required to give security, it must be in the form of a bond, with one or more surety or sureties, to the person proposed to be secured (R 38) The bond is to be in a penal sum not less than that for which security is taken (R 39) A deposit in court may, however, be made in lieu of security by bond (R 40) Again (by R 42), the security of a guarantee association may be given in lieu of a bond or deposit

By whom given . As to security by a trustee in bankruptcy, see *Trustee*, p 318, security by trustee under composition, see R 210 and *Composition or Scheme of Arrangement*, p 79, security by special manager, see *Manager*, p 191

SECURITY FOR COSTS (See *Security*)**SEDUCTION**

Damages incurred owing to a seduction are not released by discharge, see *Discharge of Bankrupt*, p 130

SEIZURE OF PROPERTY

As to the provisos for seizure which may be inserted in a bill of sale, see *Bills of Sale*, p 65, as to the seizure of a bankrupt's property, see *Realisation of Property*, p 258

SEPARATE PROPERTY

A married woman carrying on a trade separately from her husband is, in respect of her separate property, subject to the bankruptcy laws as if she were a *feme sole* (M W P A, 1882, s 1 (5)) The separate property of a married woman does not pass to her husband's trustee (*Ex p Sibeth*, 1885, 14 Q B D 417), nor is it within the reputed ownership of the husband (see *Reputed Ownership*)

SERVANTS (See Clerks, Servants, and Labourers)

SERVICE OF PROCESS (and see *Notice*)

Hours for service Service of notices, orders, or other proceedings must be effected before 6 p m except on Saturdays, when it must be effected before 2 p m Service after 6 p m on any week day except Saturday shall be deemed to be service on the following day Service after 2 p m on Saturday shall be deemed to have been effected on Monday (R 90) This rule has no application to notice to a sheriff of a bankruptcy petition under s 11 of the Act of 1890 (*Lole v Bethridge*, 1898, 1 Q B 256)

Service on a firm This may be effected at the firm's place of business, on a partner or manager (R 260) As to service of a petition, see *Petition*, p 228

SET-OFF (See Mutual Credit and Set-off)

SETTLEMENT. (See Voluntary Settlement.)

SHARES

Shares held by a bankrupt may be disclaimed by the trustee if e g, they are burdened with liability for calls (see *Disclaimer*, p 138)

SHERIFF (and see Execution Creditor).

- (i) *Definition*
- (ii) *To sell by public auction*
- (iii) *Unless private sale allowed*
- (iv) *Sheriff having notice of receiving order* —
 - (a) " Goods of debtor," p 295
 - (b) What is " notice " of receiving order.
 - (c) Where there is no request to deliver
 - (d) " Costs of the execution "

SHERIFF (*cont*)

- (v) *Duty where execution for sum exceeding £20*
 - (a) "Exceeding £20," p 293
 - (b) "Fourteen days"
- (vi) *Bona fide purchaser from sheriff*
- (vii) *Bail bond given to sheriff* p 297
- (viii) *How affected by bill of sale*

It has already been pointed out that it is an act of bankruptcy to allow goods or the proceeds of the sale of goods taken under execution to remain in the hands of the sheriff for 21 days (see *Act of Bankruptcy* p 17). The Bankruptcy Act also contains provisions which are intended to settle the question whether goods held by the sheriff belong to the execution creditor or the trustee.

(i) **Definition** The term "sheriff" as used in the Act, includes any officer charged with the execution of a writ or other process (see *Interpretation of Terms* p 183, but does not include a mere "man in possession" (*Ex p Warren* 1885, 15 Q B D 48).

(ii) **To sell by public auction** Where the sheriff sells the goods of a debtor under an execution for a sum exceeding £20 (including legal incidental expenses), the sale must unless the court otherwise orders be by public auction and not by bill of sale or private contract and must be publicly advertised on and during the three previous days preceding the sale (B A 1883 s 145). If the sheriff contravenes this section the sale is irregular but valid until actually set aside (*Crawshaw v Harrison* 1894 1 Q B 79).

(iii) **Unless private sale allowed** The sheriff may apply for leave to sell privately but if he has had notice of another execution the court will not consider an application until notice has been given to the other execution creditors, who may appear and be heard (B A, 1890, s 12).

(iv) **Sheriff having notice of receiving order** "Where any goods of a debtor are taken in execution and before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall on request deliver the goods and any money seized or received in part

SHERIFF (*cont.*), (*index*, p 293)

satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge" (B A, 1890, s 11 (1))

This section applies to *any* execution, but it only applies if the execution has not been completed. Certain words and phrases used require explanation

(a) "*Goods of a debtor*" The goods of a debtor within the meaning of these provisions do not include goods impounded to meet the landlord's claim for rent (*In re Mackenzie*, 1899, 2 Q B 566). It is important to notice that the rule in bankruptcy which exempts tools, bedding, etc., to the value of £20, has no application to a sale by the sheriff, who may sell everything except tools, etc., to the value of £5, which are exempt from seizure by virtue of 8 and 9 Vict c 127, s 8 (see *In re Dawson*, 1899, 2 Q B 54)

Goods in the sheriff's possession are not within the order and disposition section (see *Reputed Ownership*, p 271)

(b) *What is "notice of receiving order"* The notice must be served on the sheriff or his agent *for the purpose*, notice to a man in possession is not sufficient (*Bellyse v McGinn*, 1891, 2 Q B 227). There is no restriction as to the time when the notice may be served (see *Lole v Betteridge*, 1898, 1 Q B 256)

(c) *Where there is no request to deliver* Unless requested by the official receiver to hand over the goods, the sheriff must sell. The trustee cannot then question the sale (*Woolford's Estate Trustee v Levy*, 1892, 1 Q B 772). The execution creditor may, however, be deprived of the benefit of his execution by virtue of s 45 (see *Execution Creditor*)

(d) "*Costs of the execution*" as to these, see *In re Wells and Croft*, 1893, 10 Mor 69. The costs must be taxed by the officer of the court, and if the bill of costs is not brought in for taxation within one month from the date of the delivery of money or goods the official referee or trustee may decline to pay them (R 118. As to costs under s s (2), see R 119)

(v) *Duty where execution for sum exceeding £20* "Where under an execution in respect of a judgment for a sum exceeding twenty

SHERIFF (*cont*), (*index*, p 293)

pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor and a receiving order is made against the debtor thereon or any other petition of which the sheriff has notice the sheriff shall pay the balance to the official receiver or as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor" (B A, 1890 s 11 (2))

It follows from this section that the sheriff *must* retain for 14 days the proceeds of sale where the execution has been for a sum exceeding £20 Notice of a *petition* is here sufficient

The words, " the goods of a debtor " which are to be found in the first line of s s (1) make it plain that the sub-section only applies where the debtor whose goods are seized and the debtor who is the subject of the petition are the same person So where there was judgment and execution against a firm, and a receiving order against an individual partner the trustee had no title as against the execution creditor (*Drbb v Brooke & Sons* 1894 2 Q B 338)

(a) " *Exceeding £20* " Inasmuch as the creditor who issues execution for a sum exceeding £20 runs the risk of bankruptcy preventing his getting anything, he may be well advised to abandon the excess over that amount and issue execution for a less sum This is legitimate (see *In re Hinks Ex p Bailhu* 1878, 7 Ch D 882) By adopting this course he avoids another evil, namely, sale by public auction, in which manner goods seized for more than £20 must be sold unless the court otherwise orders (B A, 1883, s 145)

(b) " *Fourteen days* " This period commences to run at the completion of the whole sale (*Jones v Pincell*, 1883 11 Q B D 430), not from the date of the last receipt of the purchase money by the sheriff (*In re Cripps & Co*, 1888, 21 Q B D 472 As to the effect of an interpleader order, see *Heathcote v Livesley*, 1887, 19 Q B D 285)

(vi) *Bona fide purchaser from sheriff* An execution levied by seizure and sale on the goods of a debtor is not invalid by reason only of its being an act of bankruptcy, and a person who purchases

SHERIFF (*cont.*), (*index* p 293).

the goods in good faith under a sale by the sheriff shall in all cases acquire a good title to them against the trustee in bankruptcy (B A, 1883 s 46 (1))

- (vii) Bail bond given to sheriff. A bail bond given to a sheriff is not released by an order of discharge (see *Discharge of Bankrupt*)

(viii) How affected by bill of sale : Unregistered bills of sale are void as against the sheriff (see *Bills of Sale* p. 68)

SHORTHAND NOTES

As to the employment of a shorthand writer see R 67

SMALL BANKRUPTCIES.

- (i) *Generally*
- (ii) *Application of Bankruptcy Act to —*
 - (a) *Trustee*
 - (b) *Committee of inspection*
 - (c) *Other modifications* p. 298
- (iii) *Application for order for summary administration*
- (iv) *Rules as to summary administration*
- (v) *Disclaimer of lease* p 299
- (vi) *Costs in summary case*

(i) *Generally* : When a petition is presented by or against a debtor and the court is satisfied that the property of the debtor is not likely to exceed in value £300 the court may make an order that the estate be administered in a summary manner (B A 1883, s 121)

(ii) *Application of Bankruptcy Act to* : Where such an order is made the provisions of the Bankruptcy Act apply with the following modifications —

(a) *Trustee* : If the debtor is adjudged bankrupt the official receiver is the trustee in bankruptcy (*ib* s.s (1)) but the creditors may, by special resolution resolve that some person other than the official receiver shall be appointed trustee

As to the accruer of the trustee's title where a receiving order is made against a judgment debtor. see *Title of Trustee* p 313

(b) *Committee of inspection* . There is no committee of inspection but the official receiver may with the permission of the Board of Trade do all things which may be done by the trustee with the

SMALL BANKRUPTCIES (*cont*)

permission of the committee (*ib*, s s (2), see *Committee of Inspection*, p 77

(c) *Other modifications* Such other modifications as may be made in the provisions of the Bankruptcy Act by the Bankruptcy Rules, provided that the rules must not modify the provisions of the Act with regard to the examination or discharge of the debtor (*ib*, s s (3)), (see par iv, *infra*)

(iii) *Application for order for summary administration* As soon as he has received notice of his appointment, the official receiver or his deputy must hold a personal interview with the debtor, in order to decide whether the estate shall be administered under s 121 (R 324) The report of the official receiver is sufficient evidence on which to make an order under this section No affidavit is necessary (*In re Hornblow, Ex p O R*, 1885, 53 L T 155)

Form of application for summary administration under section 121 (No 44)

(*Title*)

I, G H, the official receiver in the above matter, hereby report to the Court that the property of the debtor is not likely to exceed in value £300, and I apply that the Court may order the estate to be administered in a summary manner pursuant to section 121 of the Act

Dated this

day of

188

G H, Official Receiver

Form of order for summary administration (No 45.)

(*Title*)

Upon the application of _____ and reading _____ it is ordered that the estate of the above-named debtor be administered in a summary manner pursuant to section 121 of the Act

Dated this

day of

188

By the Court,
Registrar

(iv) *Rules as to summary administration* Rule 273 of the Bankruptcy Rules makes the following provision for summary administration The proceedings are not advertised in a local paper, unless the Board of Trade so directs If no proposal for a composition or scheme is lodged as provided by s 3 of the Bankruptcy Act, 1890 (as to which see *Composition or Scheme*, p 79), or within such time as the official receiver may fix, or if the official receiver satisfies the court that the debtor has absconded, or that the debtor does not intend to propose a composition or scheme,

SMALL BANKRUPTCIES (*cont*), (*index*, p 297)

or that the composition or scheme proposed is not reasonable or calculated to benefit the creditors, the court may forthwith adjudge the debtor bankrupt. If during or at the end of the public examination, the court is of opinion that a composition or scheme ought not to be sanctioned by reason of the conduct of the debtor, the court may forthwith adjudge the debtor bankrupt. All payments must, unless the Board of Trade otherwise orders, be made into and out of the Bank of England. The first meeting of creditors may, where it is expedient, be held on the day appointed for the public examination, or on any other day fixed by the official receiver. If a *quorum* is not present, it is not necessary to adjourn the meeting. On an application by the bankrupt for his discharge, the certificate of the official receiver must not include, nor is notice to be sent to, creditors whose debts do not exceed £2. Further, notice of meetings other than first meetings, are only to be sent to creditors whose debts or claims exceed the sum of £2. Finally, the estate is to be realized with all reasonable despatch, and where practicable distributed in a single dividend when realised.

(v) **Disclaimer of lease** It is also provided by R 320 (1) (b), that in a summary case a lease may be disclaimed without leave of the court where the bankrupt has not sub-let the demised premises or any part thereof, or created any charge or mortgage upon the lease.

(vi) **Costs in summary case** The costs or charges of any person employed by the official receiver other than a solicitor may be paid and allowed without taxation, where such costs or charges are within the prescribed scale, but the Board may require such costs or charges to be taxed by the taxing officer (R 273 (14))

SOLICITOR (See Scale of Solicitor's Costs, p 276)

- (i) *Employment of*
- (ii) *At public examination*
- (iii) *Duty of as to bill of sale*
- (iv) *Right of audience*
- (v) *Privilege of*
- (vi) *Lien of*
- (vii) *Remuneration of*

SOLICITOR (*cont*)

(i) Employment of : As to the power of the trustee to employ a solicitor in connection with the bankrupt's affairs, see *Trustee*, p 331 The employment of a solicitor by the official receiver must be sanctioned by the committee of inspection

(ii) At public examination : A solicitor must be authorised in writing if he takes part in the public examination of a debtor on behalf of a creditor (see *Public Examination* p 256)

(iii) Duty of as to bill of sale : For the duty of a solicitor with regard to an absolute bill of sale, see *Bills of Sale* p 59.

(iv) Right of audience : A solicitor may appear in the County Court before the bankruptcy judge of the King's Bench and in the Divisional Court but not in the Court of Appeal (1883 s 151 : *Ex p Reynolds In re Barnett* 1885, 15 Q B D 169; *In re Elderton Ex p Russell* 1887. 4 Mor 36).

(v) Privilege of . A solicitor who is called as a witness with regard to the property etc of the bankrupt is entitled to professional privilege (see *Discovery of Debtor's Property and Documents* p 144)

(vi) Lien of : (See *Lien*).

(vii) Remuneration of (and see *Scale of Solicitor's Costs*) : No payment of costs to a solicitor can be allowed in a trustee's account until the bill of costs has been taxed (s 73) and for this purpose the solicitor must deliver his bill in proper time (B A 1890 s 15 (3)) Failure to do this may involve forfeiture of fees (*ib* see Rs 104-128)

As to how far payments to solicitors are protected against the relation back of the trustee's title see *Title of Trustee* p. 314 Where the trustee is a solicitor, he may contract that the remuneration for his services shall include all professional services (1883 s 73), but as to the remuneration of a solicitor acting as trustee see *Trustee*, p. 325 even then it must be in the nature of a commission (see *In re Wayman* 1889 24 Q B D. 68).

SPECIAL CASE. (See Courts, p 100.)

SPECIAL MANAGER (See Manager.)

SPECIAL RESOLUTION. (See Interpretation of Terms, p. 183)

SPECULATION

The fact that a bankrupt has brought on or contributed to his bankruptcy by rash and hazardous speculation, extravagance, gambling, or neglect of his business affairs, may prejudice his right to discharge (see *Discharge of Bankrupt*, p 127)

STAFF OF BOARD OF TRADE (See Official Receiver)

STAMP DUTY

Exemption of deeds, etc , from stamp duty "Every deed, conveyance, assignment, surrender, admission, or other assurance relating solely to freehold, leasehold, copyhold, or customary property, or to any mortgage, charge, or other incumbrance on, or any estate, right, or interest in any real or personal property which is part of the estate of any bankrupt, and which, after the execution of the deed, conveyance, assignment, surrender, admission, or other assurance, either at law or in equity, is or remains the estate of the bankrupt or of the trustee under the bankruptcy, and every power of attorney, proxy paper, writ, order, certificate, affidavit, bond, or other instrument or writing relating solely to the property of any bankrupt, or to any proceeding under any bankruptcy, shall be exempt from stamp duty, except in respect of fees under the Act (B A , 1883, s 144) "

For the purposes of this section bankruptcy includes any proceeding before or after adjudication, and whether there is adjudication or not (B R 60) Trustees should note that cheques for dividends and receipts given for payments to the estate need not, by virtue of this section, be stamped For the " fees under the Act," see *Fees and Percentages*, p 160

STATEMENT OF AFFAIRS

- (i) *To be prepared by bankrupt*
- (ii) *Assistance in preparing*
- (iii) *Duties of accountant in preparing statement*
- (iv) *Form of statement*, p 303
 - (a) *Unsecured creditors*
 - (b) *Fully secured creditors*
 - (c) *Creditors partly secured*, p 304
 - (d) *Bills discounted by debtor*
 - (e) *Contingent or other liabilities*

STATEMENT OF AFFAIRS (*cont*).

- (f) *Creditors for rent, etc , recoverable by distress*
- (g) *Preferential creditors for rates, taxes, and wages*
- (h) *Property of bankrupt*
- (i) *Debts due to the estate, p 305*
- (j) *Bills, etc , available as assets*
- (k) *Deficiency account*
- (v) *Time for preparing statement, p 306*
- (vi) *Failure to make out statement*
- (vii) *Inspection of statement*
- (viii) *Legal effect of entries in statement*
- (ix) *Statement of affairs by firm, p 307*

(i) To be prepared by bankrupt It is obvious that the first essential towards the proper administration of a bankrupt estate is to obtain an accurate account of the assets and liabilities of the person who is insolvent. It is therefore provided that where a receiving order is made against a debtor, he must make out and submit to the official receiver a statement of and in relation to his affairs. The statement must be verified by affidavit, and must show the particulars of the debtor's assets, debts, and liabilities, the names, residences and occupations of his creditors, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as may be prescribed, or as the official receiver may require (B A , 1883, s 16 (1)) The official receiver supplies the bankrupt with a form of statement (B R , 217)

As to adjudication on failure to make out statement of affairs, see *Adjudication*, p 25

A bankrupt may be made criminally liable for an omission in his statement of affairs (see *Fraudulent Debtors*, p 170)

(ii) Assistance in preparing The official receiver has power to employ some one to assist the debtor to make out his statement of affairs (see *Official Receiver*, p 211) Such assistance is often necessary where the estate is large and the transactions much involved

(iii) Duties of accountant in preparing statement In preparing a statement of affairs, as he will be often employed to do in cases of any complexity, the accountant should pay attention to the

STATEMENT OF AFFAIRS (*cont*) (*index* p 301)

following matters It will be his duty (1) To bring the bankrupt's books up to date and balance them to the date of the receiving order, (2) To extract from the books a complete list of creditors with their addresses and the amounts due to them. If the debtor has no books, the particulars must be obtained from the debtor himself, tradesmen's bills, bills of costs, demand notes writs etc (3) Having obtained the names etc, of the creditors they should be divided into (a) Creditors unsecured (b) Creditors fully secured (c) Creditors wholly or partly secured, (d) Creditors for rent wholly or partly recoverable by distress, (e) Creditors for rates taxes and wages wholly or partly preferential Having ascertained all the above particulars, the completion of the statement must be carried out on the prescribed form

(iv) **Form of statement of affairs** Form 46 of the forms appended to the Bankruptcy Rules should be exactly followed in the preparation of the statement of affairs This form is too lengthy to be set out in this work but the following explanation may be of assistance to those who have a copy of the form before them The statement consists of a species of "balance sheet" to which are annexed a number of sheets (a) to (k), which ought to be filled up before the balance sheet itself is prepared The preparation of the balance sheet by which the deficiency is arrived at, is not difficult but the sheets are not so easy to prepare

(a) **Unsecured creditors** Should contain particulars of all unsecured debts other than those referred to in s 37 of the B A 1883 which relates to mutual credits, and other than deferred debts, such for instance as a loan by a wife to a sole trader, or a debt deferred by the Partnership Act 1890 s 3 The names of the creditors should be arranged alphabetically creditors for £10 and upwards being placed first. The date when the debt was contracted the consideration and particulars of contra-accounts must also be stated

(b) **Fully secured creditors** : (For definition see *Secured Creditors*, p 288) Certain creditors are secured by law Thus a solicitor may have a lien for costs, while factors carriers bleachers and dyers may also have a lien on the property of their debtor in their possession It is necessary to state in the last two columns of the schedule the estimated value and surplus of the security In

STATEMENT OF AFFAIRS (*cont.*), (*index* p 301)

arriving at the surplus, interest to date and the mortgagees' costs are to be deducted

(c) **Creditors partly secured** This contains the names etc., of creditors whose securities are known or estimated not to be equal to the amount of their debts. The estimated value of the security and the balance of the debt unsecured must be stated. So, if a creditor held a mortgage of £1,500 on the debtor's house, which he valued at £1,000, the balance unsecured would be £500

(d) **Bills discounted by debtor** This schedule enumerates the liabilities of the debtor on bills discounted other than his own acceptances for value. It must contain the acceptor's name, address, and occupation, whether he is liable as drawer or indorser, the date when the bill is due, the amount, the holder's name, address, etc., and the amount expected to rank against the estate for dividend

(e) **Contingent or other liabilities** This should give particulars of all liabilities not otherwise scheduled. These would include lessee's covenants in leases, uncompleted contracts, uncalled amounts upon shares and guarantees

(f) **Creditors for rent, etc., recoverable by distress** Rent, rates, etc., may be included in this list, which must show the period during which the claim accrued, the amount of the claim, the amount recoverable by distress, and the difference ranking for dividend. If the landlord has not distrained before the commencement of the bankruptcy, his right of distress is restricted to six months' rent accrued due prior to the adjudication. In any case his security only extends to the goods on the premises. For any balance he must come in as an unsecured creditor in column (a)

(g) **Preferential creditors for rates, taxes, and wages** This sheet must set out all debts which are entitled to priority (see *Priority of Debts*, p 231). It must disclose the nature of the claim, the period during which it accrued, the date when due, the amount of claim, the amount which by virtue of preference is payable in full. The difference ranks for dividend with the claims of unsecured creditors

(h) **Property of bankrupt** This must be ascertained from the debtor's books. The values appearing in his statement must be selling values, whereas in the books the assets probably appear at

STATEMENT OF AFFAIRS (*cont*), (*index*, p 301)

cost price The property will include cash at bankers and in hand, cash deposited with solicitor for cost of petition, stock in trade, machinery, trade fixtures, furniture, shares, freeholds, leasehold reversions, life policies (giving surrender value)

(1) **Debts due to the estate** Debts must be described as good, doubtful, or bad, and the amount and date when each debt was contracted, together with particulars of any securities held, must be stated. If a debtor to the estate is also a creditor, but for a less amount than his indebtedness, the balance only should be inserted as the amount of the debt.

(1) **Bills, promissory notes, etc., available as assets** This must show the names of acceptors, the amounts and dates when bills, etc., are due. It must also give particulars of any property held as security for the payment of a bill or note.

(k) **Deficiency account** Where the bankrupt has kept proper books of account, there is no difficulty about preparing this schedule, and it presents no difficulties to an accountant. But where there are no books, its preparation is not so easy. It generally has to cover a period of three years from the date of the receiving order. Unless debtor has been in the habit of keeping balance sheets, and the date of the balance sheet happens to coincide with the commencement of the period, a new balance sheet must be prepared, and the value of the stock estimated as nearly as possible.

The value of the assets (which appears at the top of the left-hand column) will be their book values. The next amount to be ascertained will be the net profit or loss which has resulted from carrying on the business for the three years, and for this the periodical profit and loss accounts (if any) will be of value, but here again certain adjustments will probably have to be made in order to arrive at the profit for the exact period required. The income of the debtor from other sources must also be inserted. This would include interest and dividends from investments, gifts (but not loans), legacies, any increase in the value of assets, bonuses from life policies, etc. Lastly, on the left-hand side the amount of the deficiency should be entered.

On the right-hand side there appear bad debts, the amount of which will be obtained from List (1) by adding to those considered wholly bad the estimated portion of doubtful debts. These debts

STATEMENT OF AFFAIRS (*cont*), (*under* p 301)

must not have been charged against profits in arriving at the net profit or loss. Special losses, such as depreciation of assets not charged against profits, losses on the stock exchange, betting losses, loss by fire, loss by life policy premiums over and above the surrender value, any extraordinary medical expenses, law costs, interest on borrowed money, and generally any source of expense or loss not charged against the profits of the business in arriving at the net profit, or included in the household expenses, and whether they have been paid or are ranking as liabilities upon the estate. Where the statement shows a surplus, the amount will be entered, and the two sides must be totalled and made to agree.

(v) **Time for preparing statement** If the receiving order is made on a debtor's petition, the statement must be submitted within three days, if made on a creditor's petition, within seven days (B A, 1883, s 16 (1), (2)). It follows, therefore, that a debtor who is about to file his petition should be ready to furnish his statement. The court may, however, in a special case, extend the time for making out the statement (*ib* (2)). Where a debtor requires any extension of the time for filing his statement, he must apply to the official receiver, who may, if he thinks fit, give a written certificate extending the time. This certificate is filed, and renders an application to the court unnecessary (B R 218).

(vi) **Failure to make out statement** Failure to make out the statement within the prescribed time may involve an adjudication of bankruptcy (B A, 1883, s 16 (3)).

(vii) **Inspection of statement** Any person stating himself to be a creditor, may either personally or by his agent inspect and take copies of or extracts from the statement, but any person who untruthfully represents himself to be a creditor for this purpose, may be punished as for contempt of court (*ib* ss (4)).

(viii) **Legal effect of entries in statement** Inasmuch as the statement of affairs is made by a debtor under compulsion of law, it cannot be used against him for any purpose which is not connected with his bankruptcy. Thus, the acknowledgment of a debt contained in the statement will not be sufficient to bar the Statute of Limitations (*Everett v Robinson*, 1858, 28 L J Q B 23).

"It is clear," said Campbell, C J, in that case (at p 24), "that if the admission be coupled with some qualification or condition

STATEMENT OF AFFAIRS (*cont.*), (*indc.*, p 301)

as to paying, inasmuch as the law cannot infer such a promise to pay as would be inconsistent with the qualification or condition expressly attached to the promise, it is insufficient. When a debtor while acknowledging the debt, says, 'I am in difficulties but if time be given me,' or 'if my creditors will make a compromise or take a composition,' I will pay, the law will not infer an unconditional promise to pay which is inconsistent with what is said by the debtor" (See also *Ex p Topping, In re Levey*, 1865, 34 L J Bank, 44) But it is admissible in evidence against him where he is charged with misappropriation as a trustee or similar frauds under the Larceny Act, 1861 (*R v Pike*, 1902, 1 K B 552)

(14) **Statement of affairs by firm** As to statement of affairs by firm, see *Partners and Joint Debtors*, p 216

STATING CASE

A County Court judge has power to state a case on a point of bankruptcy law (see *Courts*, p 100)

STATUTE OF LIMITATIONS

An acknowledgment of a debt in a statement of affairs does not take it out of the statute (see *Statement of Affairs*, p 306) A statute-barred debt is not a good debt for the purposes of a petition (see *Petition*, p 220)

If during the continuation of a bankruptcy the trustee does not enforce a claim which thus becomes barred by the statute, such claim remains barred if the bankruptcy is annulled (*Markwick v Hardingham*, 1880, 15 Ch D 339)

STAY OF EXECUTION (See Acts of Bankruptcy, p 21)

STAY OF PROCEEDINGS AFTER BANKRUPTCY

- (a) *Generally*
- (b) *Effect of the section*
- (c) *Proceedings not restrained*
- (d) *Service of order to stay*

(a) **Generally** The court may at any time after the presentation of a bankruptcy petition stay any action execution or other legal process against the property or person of the debtor and any court in which proceedings are pending against a debtor may, on proof

STAY OF PROCEEDINGS AFTER BANKRUPTCY (*cont*).

that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just (B A , 1883, s 10 (2))

(b) *Effect of the section* This section gives wide powers to the court to restrain proceedings against the debtor or his estate, although no receiving order has been made. The general rule is that the court will not restrain proceedings to which the discharge of the debtor would be no defence (*Ex p Coke*, *In re Blake*, 1875, L R 10 Ch 652)

(c) *Proceedings not restrained* For instance, a claim in tort against a bankrupt for a fraudulent breach of trust would not be restrained. But to persevere in such an action is practically useless, as execution is not allowed until after discharge (*Cobham v Dalton*, 1875, L R 10 Ch 655). Cases of this character do not often arise, inasmuch as a bankrupt, to use a colloquial phrase, is seldom worth powder and shot. It has been held in various cases that the following will not be restrained: The exercise of his legal rights by a mortgagee or other secured creditor (*ante* p 289), and a sequestration issued from the Court of Chancery (*In re Pollard*, 1903, 2 K B 41, *per* Cozens Hardy, L J , at p 49). On the other hand, a distress (*Ex p Birmingham Gas Co*, *In re Fanshawe*, 1871, L R 11 Eq 615) and a committal order for non-payment of rates (*In re Edgcome*, 1902, 2 K B 403) will not be restrained. As to whether the court can restrain after discharge see *Staffordshire Banking Co v Emmott*, 1867, L R 2 Ex 208 (

(d) *Service of order to stay* The order may be served by sending a copy, under the seal of the court by post to the address for service of the plaintiff or other party prosecuting such proceeding (B A , 1883, s 11)

STOCKS AND SHARES

As to realisation by a trustee of stocks and shares belonging to the bankrupt, see *Trustee*, p 334

SUMMARY ADMINISTRATION

As to summary administration under s 121 of the B A , 1883, see *Small Bankruptcies*, p 297

SUBPOENA

A subpoena for the attendance of a witness may be issued by the court at the instance of an official receiver, trustee, creditor, or debtor, or any applicant or respondent in any matter (see R 61)

SUMMARY ADMINISTRATION. (See Small Bankruptcies.)

SUNDAY. (See Time.)

SURETY.

A surety cannot generally receive anything until the creditor has been paid twenty shillings in the pound (*Ex p Turquand, In re Fothergill*, 1876, 3 Ch D 445). His contingent liability is a debt provable in bankruptcy of the principal debtor (*In re Paine, Ex p Read*, 1897, 1 Q B 122), and see, generally, *Debts Provable in Bankruptcy*, p 109. A surety is not released by the acceptance of a composition or scheme (1890, s 3 (19)), nor by an order of discharge (1883, s 30 (4)), and see *Discharge of Bankrupt*, p 129. As to whether a payment made with a view to relieving a surety is a fraudulent preference, see *Fraudulent Preference*, p 176.

SURPLUS.

The bankrupt is entitled to the surplus which remains after payment of his creditors in full (see *Dividends*, p 150). Where a debtor dies insolvent, and his estate is administered in accordance with the law of bankruptcy, the surplus is paid over to his legal personal representative (see *Deceased Debtor*, p 113).

SUSPENSION OF DISCHARGE. (See Discharge of Bankrupt, p 125.)

TAXATION (and see Costs).

All bills and charges of solicitors, managers, accountants, auctioneers, brokers, and other persons, not being trustees, must be taxed by the prescribed officer, and no payments in respect thereof can be allowed in the trustee's accounts without proof of such taxation having been made. The taxing master must satisfy himself before passing such bills and charges that the employment of such solicitors and other persons, in respect of the particular matters out of which such charges arise, has been duly sanctioned (B A, 1883, s 73 (3)).

The sanction here referred to must be a sanction obtained before the employment except in cases of urgency, and in

TAXATION (*cont.*)

such cases it must be shown that no undue delay took place in obtaining the sanction (B A, 1890, s 15 (3)) A resolution that the solicitors "be employed by the trustee where necessary" is too vague a sanction (*In re Vavasour*, 1900, 2 Q B 309) The Committee in giving permission to employ a solicitor may limit the amount of costs to be incurred (*In re Duncan, Ex p O R*, 1892, 1 Q B 879)

Every such person must on request by the trustee (which request the trustee is to make a sufficient time before declaring a dividend) deliver his bill of costs or charges to the proper officer for taxation, and if he fails to do so within seven days after receipt of the request, or such further time as the court, on application, may grant, the trustee must declare and distribute the dividend without regard to any claim by him, and thereupon any such claim must be forfeited, as well against the trustee personally as against the estate (*ib*, s s (4))

TAXES. (See Priority of Debts, p 231)

TEN SHILLINGS IN THE POUND

The fact that a bankrupt's assets are not equal to ten shillings in the pound may prevent his discharge, unless he is able to show that this state of things has arisen from circumstances for which he cannot be held responsible (see *Discharge of Bankrupt*, p 126, as to meaning of ten shillings in the pound, see *ib*)

TENANT (See Landlord and Tenant)

TENDER

Where a judgment debtor makes a tender of a judgment debt within seven days, this will prevent the commission of an act of bankruptcy under 1883, 4 (g) (*Ex p Danks, In re Farley*, 1852, 22 L J Bank 73) Where tender is made by a bankrupt after an act of bankruptcy, the creditor is fully justified in refusing the money (*In re Lowe*, 1890, 7 Mor 25)

THINGS IN ACTION (See Chose in Action, and Property Divisible amongst Creditors, p 275)

THREE MONTHS

The act of bankruptcy upon which a petition is founded must have taken place within three months of the date of the petition. As to the calculation of three months, see *Petition*, p 220

TIME.

Computation of time In the computation of limited time the same is taken as exclusive of the day of that date or of the happening of the event and as commencing at the beginning of the next following day, and the act or proceeding shall be done or taken at latest on the last day of that limited time as so computed, unless the last day is a Sunday, Christmas day, Good Friday, or Monday or Tuesday in Easter Week, or a day appointed for public fast, humiliation, or thanksgiving, or a day on which the court does not sit, in which case any act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, which shall not be one of the days in this section specified (B A, 1883, s 141 (1))

Where any act or proceeding is directed to be done or taken on a certain day, then if that day happens to be one of the days above specified, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, which shall not be one of the days so specified (*ib*, (2))

The court may extend or abridge time as it thinks proper (1883, s 105) As to time for admission and rejection of proofs, see Rs 227, 228, for appealing as to proofs, Rs 230-232, for preparing statement of affairs, see *Statement of Affairs*, p 306 As to when the period of fourteen days for which the Sheriff must hold the proceeds of sale begins to run, see *Sheriff*, p 293

TITLE OF TRUSTEE (See also Trustee in Bankruptcy, Property Divisible amongst Creditors)

- (i) *Generally*
- (ii) *Text of s 23, p 312*
- (iii) *Explanation of the section*
- (iv) *Where receiving order made under B A, 1883, s 103*
- (v) *Effect of relation back, p 313*
- (vi) *Exceptions to the doctrine of relation back —*
 - (a) *Execution creditor*
 - (b) *Person dealing with bankrupt before receiving order*
 - (c) *Solicitors, p 314*
 - (d) *Payment to accountant*
 - (e) *Where services rendered to estate*

(1) **Generally** The first question to consider in order to find

TITLE OF TRUSTEE (*cont*), (*index*, p 311)

out what property is available for the payment of debts is—When does the trustee's title commence? Speaking for a moment quite generally, all property to which the bankrupt is entitled at the date when the trustee's title begins, or to which he becomes entitled thereafter, and before his discharge, is available for the creditors. It is obvious, however, that if the law were to provide that bankruptcy shall commence on a definite date—as for instance, the date of the receiving order—the claims of many creditors might be defeated.

(ii) Text of s 43. In order to prevent any such abuse, the legislature has provided means whereby the trustee's title to the bankrupt's property shall accrue at the date of the act of bankruptcy. Thus it is provided by s 43 of the Act of 1883, that "The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition, but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor."

(iii) Explanation of the section. It follows from this section that the trustee's title is not limited by the date of his appointment, the date of the receiving order, or the date of adjudication. It is also clear that, subject to certain exceptions to be presently considered, he may claim any property which becomes due to the debtor after the date of the act of bankruptcy. Again speaking generally, persons who continue to deal with and to receive money from the debtor after that date, may find themselves compelled to refund that money to the trustee. "The result of the relation back," said Lord Esher in *In re Pollitt, Ex p Minor* (1893, 1 Q B 455), "is that all subsequent dealings with the debtor's property must be treated as if the bankruptcy had taken place at the moment when the act of bankruptcy was committed. Then, he being

TITLE OF TRUSTEE (*cont.*), (*index* p 311)

a bankrupt, all the money which he then had, and all the money which was owing to him, passed to the trustee in the bankruptcy for the purpose of being distributed by him amongst the bankrupt's creditors" (see further, par (v), *infra*)

(iv) Where receiving order made under B A , 1883, s 103 Again, where a receiving order is made against a judgment debtor under s 103 of the B A , 1883 (as to which see *Small Bankruptcies*), the bankruptcy relates back to and commences at the date of the order, unless the debtor is proved to have committed any previous act of bankruptcy, in which case the bankruptcy relates back to and commences at the time of the first of the acts of bankruptcy committed by the debtor within three months next preceding the date of the order (B A , 1890, s 20)

(v) Effect of relation back The effect of "relation back" may be illustrated by the following case A debtor, after judgment had been obtained against him, sold his business to a one-man company of which he was managing director, for £3,000 Within three months of this sale a bankruptcy petition was presented against him, and the sale to the company was held to be an act of bankruptcy It was held that by virtue of relation back, the trustee was entitled to the assets of the business which existed at the date of the transfer, and to the proceeds of such assets and business remaining in hand in priority to the creditors of the company (*In re Huth Ex p Trustee*, 1899, 1 Q B 612) It may seem harsh that the doctrine of relation back should affect persons who have to do with the bankrupt after an act of bankruptcy, but it is to be remembered that every one is presumed to know the law Consequently, the man who has knowledge of dealings on the part of a debtor which amount to an act of bankruptcy must exercise due caution If he does not do so he has only himself to blame

(vi) Exceptions to the doctrine of relation back —

(a) *Execution creditor* If a creditor has completed an execution before the receiving order and before notice of a petition, or of an available act of bankruptcy, he may retain the proceeds thereof against the trustee

(b) *Person dealing with bankrupt before receiving order* Again, (by s 49) a person dealing with the bankrupt before the date of the

TITLE OF TRUSTEE (*cont*), (*index*, p 311)

receiving order, for valuable consideration, and without notice of an act of bankruptcy, is protected (see *Protected Transactions*, p 252)

(c) *Solicitors* Solicitors who are consulted by a prospective bankrupt are in some degree protected. Thus, if a debtor pays ready money to a solicitor in order to defray the necessary legal expenses which may be incurred in opposing a petition, the trustee cannot make the solicitor refund the money (*In re Sinclair, Ex p Payne*, 1885, 15 Q B D 616). In the case of *In re Spackman, Ex p Foley*, 1890 (24 Q B D 728), it was held that where a debtor retains a solicitor to effect an arrangement with his creditors, and gives authority to the solicitor to sell property belonging to him and apply the proceeds to the payment of the solicitor's charges under the retainer, upon the debtor's subsequently becoming bankrupt such solicitor cannot retain proceeds of the property in respect of charges subsequent to knowledge by him of an available act of bankruptcy committed by the debtor (see also *In re Simonson, Ex p Ball*, 1894, 1 Q B 433). Again, where a valid agreement was entered into for payment of a lump sum by the bankrupt to his solicitor for certain definite services and the solicitor continued to perform his part of the agreement after notice of the act of bankruptcy, it was held that the agreement was binding against the trustee, and that the solicitor was entitled to retain the money (*In re Charwood, Ex p Masters*, 1894, 1 Q B 645).

But the exception will apply only to the case of ready money paid over, and not to money in the hands of the solicitor or agent (*In re Whillock, Ex p. O R*, 1894, 1 Mans. 33).

(d) *Payment to accountant* A payment made by the bankrupt to an accountant for work done with a view to a composition arrangement which was not completed, was held not good against the trustee (*In re White, Ex p Ward*, 1898, 78 L T 25, see also *In re Pollitt, Ex p Minor, ubi supra*).

(e) *Where services rendered to estate* "The trustee has a discretion to adopt and pay for such of the services rendered as may have been useful to the creditors, but he must be very strict in so doing, and must go through the items, only paying for those which he is clearly satisfied have been so that a benefit has resulted to the creditors" (*In re Simonson, Ex p Ball*, 1894, 1 Q B 433, per Vaughan Williams, L J, at p 438).

TOOLS (See Property not Divisible amongst Creditors, p 247)

TORTS,

Generally speaking, a claim for damages for tort, i.e., trespass, libel, etc., gives a man no right of proof in bankruptcy. It is otherwise where damages are agreed or judgment has been signed (see *Debts Provable in Bankruptcy*, p 106)

TRADE DEBTS

Trade debts are subject to the order and disposition of the bankrupt (see *Reputed Ownership*, p 274)

TRADE OR BUSINESS

As to meaning of these words in connection with the reputed ownership clause, see *Reputed Ownership*, p 271

TRADER.

Where money is lent to a trader upon the terms that the lender is to receive a rate of interest varying with the profits or a share of the profits in consideration of the sale of the goodwill, and the trader becomes bankrupt, the lender may prove but cannot recover anything until other creditors have been satisfied (*Partnership Act*, 1890, s s 2, 3, and see *Debts Provable in Bankruptcy*, p 106) The fact that a trader has omitted to keep proper books may prejudice his discharge (see *Discharge of Debtor*, p 126)

TRADING ACCOUNTS (See Accounts of Trustee, p 6)

TRADING AFTER INSOLVENCY (See Discharge of Bankrupt, p 126)

TRANSFER OF PROCEEDINGS (See Courts, p 100)

TRIAL.

As to trial of question relating to the debt on which a petition is presented, see *Petition*, p 223

TRUE OWNER

As to the meaning of this phrase for the purposes of the order and disposition section, see *Reputed Ownership*, p 272 The grantor of a bill of sale given to secure an advance must be the true owner of the goods mentioned in the schedule (see *Bills of Sale*, p 63)

TRUST.

Property held on trust is not, generally speaking, divisible amongst a bankrupt's creditors (see *Property not Divisible amongst Creditors*, p 247)

TRUSTEE (and see *Accounts of Trustee Annual Report of Trustee*, *Title of Trustee*, *Composition or Scheme of Arrangement*)

(i) GENERALLY

(ii) APPOINTMENT OF TRUSTEE BY CREDITORS p 318

(a) *Generally*

(b) *More than one trustee*

(c) *Trustee to give security*

(d) *Appointment to be approved by Board of Trade*

(e) *Disqualifications*, p 319

(f) *Appeal from objection by board*

(g) *Certificate to be evidence of appointment*

(h) *When official receiver may act*

(i) *Vacancy in office of trustee*

(iii) APPOINTMENT BY THE BOARD OF TRADE p 320

(iv) RELEASE OF TRUSTEE p 320

(a) *Generally*

(b) *Where release withheld*, p 321

(c) *Effect of release*

(v) REMOVAL OF TRUSTEE p 321

(a) *By creditors*

(b) *By Board of Trade*, p 322

(c) *By his own act*

(vi) RESIGNATION OF TRUSTEE

(vii) VACANCY IN OFFICE OF TRUSTEE, p 323

(viii) TRUSTEE'S REMUNERATION, p 323

(a) *Generally*

(b) *Trustee not to vote*, p 324

(c) *Amount realised*

(d) *How to arrive at amount realised*

(e) *Reduction of remuneration*

(f) *Not to receive anything beyond his remuneration*

TRUSTEE (*cont*)

- (g) *When fixed by Board of Trade*, p 325
- (h) *Trustee acting without remuneration*
- (i) *Where trustee a solicitor*
- (ix) DISCRETIONARY POWERS AND CONTROL THEREOF, p 325
 - (a) *To regard direction of creditors*
 - (b) *To summon meetings*
 - (c) *To apply to court*, p 326
 - (d) *When to use his own discretion*
 - (e) *Appeal to court against trustee*
 - (f) *Meeting to consider action of trustee*, p 327
 - (g) *Control by Board of Trade*
- (x) VESTING OF PROPERTY, p 327
- (xi) POWER TO DEAL WITH BANKRUPT'S PROPERTY, p 328
 - (a) *Generally Sale of property to trustee or committeeman, Position of purchaser from trustee*
 - (b) *Powers exercised by permission of committee of inspection*, p 329, *et seq* (1) *Conduct of business*, (2) *Conduct of actions*, (3) *Employment of solicitor*, (4) *Accept future payment*, (5) *Mortgage debtor's property*, (6) *Arbitrations, compromises, etc*, (7) & (8) *Compromise claims, etc*, (9) *Divide peculiar property*, (10) *Power to allow bankrupt to manage property*, (11) *Allowance to bankrupt for maintenance*, p 333
- (xii) REALISATION OF BANKRUPT'S PROPERTY, p 333
 - (a) *Possession of property generally*
 - (b) *No lien on books, etc*
 - (c) *Stocks, shares, etc*, p 334
 - (d) *Copyholds, choses in action, etc*
 - (e) *Surrender of property to trustee*
- (xiii) MISCELLANEOUS POWERS, ETC, OF TRUSTEE, p 334

(i) **GENERALLY** The function of the trustee in bankruptcy—as his name implies—is to act generally on behalf of the creditors in the collection and distribution of the bankrupt's estate. It is now proposed to consider his appointment, duties, and liabilities.

A trustee may sue and be sued by the official name of "The trustee of the property of a bankrupt,"

TRUSTEE (*cont*), (*index*, p 316)

inserting the name of the bankrupt, and by that name may hold property, make contracts, sue and be sued, enter into engagements binding on himself and his successors, and do all other acts necessary in the execution of his office (B A , 1883, s 83) A claim by a trustee in bankruptcy as such must not, except by leave of the court, be joined with any claim by him in any other capacity (R S C , Ord xviii, R 3)

(ii) APPOINTMENT OF TRUSTEE BY CREDITORS —

(a) **Generally** Where a debtor is adjudged bankrupt, or the creditors have resolved that he be so adjudged, they may by ordinary resolution, either appoint some fit person, whether a creditor or not, to be trustee, or they may resolve to leave his appointment to the committee of inspection (B A , 1883, s 21 (1)) The resolution is to be passed at the first meeting of the creditors, or an adjournment thereof (*ib* , s 15 (1)).

(b) **More than one trustee** The creditors may also, if they think fit, appoint more persons than one to the office of trustee, and when more persons than one are appointed they shall declare whether any act required or authorised to be done by the trustee is to be done by all or any one or more of such persons, but all such persons are included under the term "trustee," and are joint-tenants of the property of the bankrupt (B A , 1883, s 84 (1)) (For cases relating to the powers, etc , of joint trustees, see *Williams*, p. 308)

The creditors may also appoint persons to act as trustees in succession in the event of one or more of the persons first named declining to accept the office of trustee, or failing to give security, or not being approved of by the Board (*ib* , (2))

(c) **Trustee to give security** The person chosen by the creditors to act as trustee must give security to the satisfaction of the Board of Trade If a trustee gives security in the form of a bond with a guarantee corporation, he must pay the premium himself As to consequences of failure to keep up security, see par v (b), *post*

For a form of notice of meeting to be held to appoint a new trustee, see *Meetings of Creditors*, p 196, and for minutes of meeting for receiving resignation of trustee, see *ib*

(d) **Appointment to be approved by Board of Trade** The Board, if satisfied with the security, must certify that the trustee's

TRUSTEE (*cont.*), (*index*, p 316)

appointment has been duly made, unless they object to his appointment on the ground that—(a) It has not been made in good faith by a majority in value of the creditors voting, or (b) That the person appointed is not fit to act as trustee, or (c) That his connection with or relation to the bankrupt or his estate, or any particular creditor, makes it difficult for him to act with impartiality in the interests of the creditors generally (B A , 1883, s 21 (2))

(e) **Disqualifications** A person is deemed to be not fit to act as trustee if he has been previously removed from the office of trustee in bankruptcy for misconduct or neglect of duty (B A , 1890, s 4) Further, if a trustee has been removed for misconduct within the meaning of s 86 (1), or has failed to render his accounts within the proper time, there will be sufficient reason to justify the Board of Trade refusing to certify his appointment to a fresh trusteeship (B R 301, see also sub tit *Removal, par v infra*)

In *In re Games*, 1884, 1 Mor 216, it was held that the fact that a trustee had been proposed by the brother of the bankrupt, and that such trustee had previously voted in favour of a composition and scheme of arrangement of the debtor's affairs, and that no committee of inspection is appointed, will not justify the Board of Trade in objecting to a particular trustee, even though the majority of the creditors desire that such objection should be made It is a good ground of objection that the trustee must himself account to the estate, for he would then have to investigate his own account (*In re Mardon*, 1896, 1 Q B 140)

(f) **Appeal from objection by Board** If the Board of Trade do make objection to the appointment of a trustee, they must, if so required by a majority in value of the creditors, notify the objection to the High Court, which may decide on the validity of the objection (B A , 1883, s 21 (3)) The court, however, will only question the validity of the objection in point of law, it is not concerned with the merits of the appointment (*In re Mardon*, 1896, 1 Q B 140)

(g) **Certificate to be evidence of appointment** The certificate of the Board of Trade is conclusive evidence of the trustee's appointment (B A , 1883, s 138), and his appointment takes effect as from the date of the certificate (*ib* , s 21 (4))

(h) **When official receiver may act** The official receiver may not act as trustee except in the cases especially provided for by the

TRUSTEE (*cont*), (*index*, p 316)

act (B A , 1883, s 21 (5)) He is to be trustee until the proper trustee is appointed (*ib* , s 54) , during any vacancy in the office (*ib* , s 70 (1) (g)) , in small bankruptcies (s 121 (1)) , and in the administration of the estate of a deceased insolvent (s 125 (5)) •

(iii) APPOINTMENT BY THE BOARD OF TRADE If the creditors do not appoint a trustee within four weeks of the adjudication, or in the event of negotiations for a composition or scheme being pending at the expiration of those four weeks, then within seven days from the close of those negotiations, the official receiver must report the matter to the Board of Trade The Board must thereupon support some fit and proper person to be trustee, and must certify his appointment (B A , 1883, s 21 (6)) The appointment of a trustee by the Board may, however, be purely temporary, for the creditors (or the committee of inspection if so authorised) may at any subsequent time themselves appoint a trustee Upon such appointment being made and certified, the person appointed by the Board of Trade is supplanted (*ib* , s s (7)) (As to the powers, etc , of such a trustee, see *Board of Trade v Provident Clerks and General Guarantee Association Ltd* , 1895, 72 L T 562)

(iv) RELEASE OF TRUSTEE When the trustee has realised all the property of the bankrupt, or so much thereof as can, in his opinion, be realised without needlessly protracting the trusteeship, and distributed a final dividend, if any, or has ceased to act by reason of a composition having been approved, or has resigned, or has been removed from his office, the Board of Trade must, on his application, subject to the consideration of a report as to his accounts, etc , either grant or withhold the release, subject nevertheless to an appeal to the High Court (B A , 1883, s 82 (1))

An appeal under this sub-section must be brought within twenty-one days (B A , 1883, s 139), and must be heard in Court (B R 6 (d)) The release of a trustee does not prevent the court making an order upon him in consequence of his refusal to pay a dividend (*In re Prager, Ex p Société Cockrill*, 1876, 3 Ch. D 115) Before making application to the Board for his release, the trustee must give notice to all the creditors who have proved their debts, and to the debtor, and must send with such notice a summary of his receipts and payments as trustee Where, however, he ceases to act by reason of a composition having been approved, he need only

TRUSTEE (*cont*), (*index*, p 316)

give notice to the debtor (B R 309) The release of a trustee is gazetted by the Board (B R 310), and does not take effect until he has delivered over all books, papers, and documents to the official receiver (B R 310A)

(b) **Where release withheld** If the release of a trustee is withheld, the court may, on the application of any creditor or person interested, make such order as it thinks just, charging the trustee with the consequences of any act or default he may have done or made contrary to his duty (B A, 1883, s 82 (2))

(c) **Effect of release** An order of the Board releasing the trustee discharges him from all liability in respect of any act done or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact (*ib*, s s (3))

"Suppression or concealment of any material fact" means suppression or concealment of a material kind (*In re Harris, Ex p Hasluck*, 1899, 2 Q B 97)

Where the trustee has not previously resigned or been removed, his release shall operate as a removal of him from his office, and thereupon the official receiver shall be the trustee (B A, 1883, s 82 (4)) On release of a trustee in accordance with this subsection, the creditors have no power to appoint a fresh trustee, the duties devolving on the official receiver (*In re Leach, Ex p Barnes*, 1900, 2 Q B 649)

(v) REMOVAL OF TRUSTEE —

(a) **By creditors** The creditors may, by ordinary resolution, at a meeting specially called for that purpose, of which seven days' notice has been given, remove a trustee appointed by them, and may at the same or any subsequent meeting appoint another person to fill the vacancy as provided in case of a vacancy in the office of trustee (B A, 1883, s 86 (1))

Where one-fourth in value of the creditors desire that a general meeting of the creditors may be summoned to consider the propriety of removing the trustee, such meeting may be summoned by a member of the committee of inspection, or by the official receiver,

TRUSTEE (*cont*), (*index*, p. 316)

on the deposit of a sum sufficient to defray the expenses of summoning the meeting (R 311)

(b) By Board of Trade: If the Board are of opinion that a trustee, appointed by the creditors is guilty of misconduct, or fails to perform his duties under the Act, the Board may remove him from his office, but if the creditors, by ordinary resolution, disapprove of his removal, he or they may appeal against it to the High Court (*ib*, (2))

Thus, where a trustee has given security in the prescribed manner, but fails to keep up such security, the Board of Trade may, if they think fit, remove him from his office (R 302) The powers of the Board to remove a trustee under this section also extend to any case in which the Board are of opinion that the trustee is by reason of lunacy, or continued sickness, or absence, incapable of performing his duties, or that his connection with or relation to the bankrupt, or his estate, or any particular creditor, might make it difficult for him to act impartially, or where in any other matter he has been removed from office on the ground of misconduct (see B A, 1890, s 19) Where a trustee omitted to pay into the Bankruptcy Estates Account moneys received by him, and forming part of the bankrupt's estate, as required by s 74 (3), and in order to conceal this irregularity, he made and caused to be made false statements as to the dates when he received the money, this was held to be misconduct justifying his removal (*In re Morgan, Ex p. Wilding*, 1895, 2 Mans 526) The court will not rescind the appointment of a trustee merely because a proof has been improperly rejected (*Ex p. Kimber, In re Thrift*, 1879, 11 Ch D. 869)

(c) By his own act If a receiving order is made against a trustee, he shall thereby vacate his office of trustee (B A, 1883, s 85) Where, however, the receiving order is rescinded on the ground that it should never have been made, he will be restored to office if no other trustee has been appointed in the meantime (*In re Newman, Ex p. O R*, 1899, 2 Q B 587)

(vi) RESIGNATION OF TRUSTEE A trustee intending to resign must call a meeting of creditors to consider whether his resignation shall be accepted or not, and must give not less than seven days' notice of the meeting to the official receiver (B R 304)

TRUSTEE (*cont.*), (*index*, p 316)

(vii) **VACANCY IN THE OFFICE OF TRUSTEE** If a vacancy occurs in the office of a trustee, the creditors may appoint a person to fill the vacancy, and thereupon the same proceedings are taken as in the case of a first appointment (B A 1883, s 87 (1))

The official receiver, on the requisition of any creditor, summons a meeting for the purpose of filling any such vacancy (*ib.*, (2))

If the creditors do not within three weeks appoint a person to fill the vacancy, the official receiver must report the matter to the Board, and the Board may appoint a trustee, but in such case the creditors or committee of inspection have the same power of appointing a trustee as in the case of a first appointment (*ib.*, (3))

During any vacancy in the office of trustee the official receiver acts as trustee (*ib.*, (4))

Where the Board appoint a trustee in accordance with s s (3), *supra*, he is to receive out of the estate such remuneration as the Board shall determine (R 307)

Report of appointment of trustee to fill a vacancy caused by resignation, etc. (No. 116)

(Title)

It is reported to the Board of Trade as follows —

1 That a meeting of creditors in this bankruptcy was held at
on the day of at o'clock in the noon,
for the purpose of receiving of *G H* his resignation of the office of trustee
and of appointing a person to fill such office [or for the purpose of appointing
a trustee in the place of *G H* who is dead, or who has resigned, or who has been
removed, or as the case may be]

2 That the said *G H* resigned the office of trustee, and by resolution at
such meeting *NO*, of , was appointed to fill the office of
trustee of the property of the bankrupt

Dated this day of , 188

F A, Chairman

(viii) **TRUSTEE'S REMUNERATION** —

(a) **Generally** Where the creditors appoint any person to be trustee of a debtor's estate, his remuneration (if any) must be fixed by an ordinary resolution of the creditors, or, if the creditors so resolve, by the committee of inspection. It is in the nature of a commission or percentage, of which one part is payable on the amount realised, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividend (B A, 1883, s 72 (1))

TRUSTEE (*cont*), (*index*, p 316)

The resolution must express what expenses the remuneration is to cover, and no liability shall attach to the bankrupt's estate, or to the creditors, in respect of any expenses which the remuneration is expressed to cover (*ib*, (3)) In voting the remuneration of the trustee, the creditors or the committee, as the case may be, must distinguish between the commission or percentage payable on the amount realised, and the commission or percentage payable on the amount distributed in dividend (R 305)

(b) **Trustee not to vote** The vote of the trustee, or of his partner, clerk, solicitor, or solicitor's clerk, either as creditor or as proxy for a creditor, must not be reckoned in the majority required for passing any resolution affecting the remuneration or conduct of the trustee (B A, 1883, s 88)

(c) **Amount realised** The "amount realised" means the amount realised by the trustee (B A, 1890, s 15 (1)) It would not include a sum paid by the bankrupt's friends in order to annul an adjudication The expression "distributed in dividend" means distributed out of assets realised by the trustee (*In re Christie*, 1900, 1 Q B 5)

(d) **How to arrive at amount realised** In arriving at the net assets realised, the trustee must deduct from the gross realisations (1) Receipts by the official receiver, (2) Sums paid to secured creditors in redemption of their securities, (3) Payments on trading accounts, and (4) Premiums on life insurance policies Before declaring his dividend, the trustee should make provision for all liabilities, and the amount left represents the amount distributable and his own remuneration Assume that he is entitled to $7\frac{1}{2}$ per cent, he should divide the residue into $107\frac{1}{2}$ portions, of which $7\frac{1}{2}$ will represent remuneration and 100 dividend

(e) **Reduction of remuneration** Where the resolution has been passed and the trustee has done work under it, neither the creditors nor the committee can reduce the remuneration simply by another resolution (*In re Marsden*, 1892, 9 Mor 70)

(f) **Not to receive anything beyond his remuneration** A trustee must not make any arrangement for or accept from the bankrupt, or any solicitor, auctioneer, or any other person that may be employed about a bankruptcy, any gift, remuneration, or other consideration or benefit beyond his ordinary remuneration, nor

TRUSTEE (*cont.*), (*under*, p 316)

can he make any arrangement for giving up, or give up, any part of his remuneration, either as receiver, manager, or trustee to the bankrupt, or any solicitor or other person that may be employed about a bankruptcy (B A , 1883, s 72 (5))

(g) **When fixed by Board of Trade** If one fourth in number or value of the creditors dissent from the resolution, or the bankrupt satisfies the Board of Trade that the remuneration is unnecessarily large, the Board must fix the amount of the remuneration (B A , 1883, s 72 (2))

The Board has power under this sub-section to fix the remuneration not only when it has been fixed by the creditors, but also when it has been fixed by the committee of inspection, *In re Galland, Ex p Harris*, 1892, 1 Q B 532

(h) **Trustee acting without remuneration** Where a trustee acts without remuneration, he shall be allowed out of the bankrupt's estate such proper expenses incurred by him in or about the proceedings of the bankruptcy as the creditors may with the sanction of the Board of Trade approve (B A , 1890, s 15 (2))

(i) **Where trustee a solicitor** Where a trustee or manager receives remuneration for his services, no payment shall be allowed in his accounts in respect of the performance by any other person of his statutory duties, which are required by statute or rules to be performed by himself (B A , 1883, s 73 (1)), but where the trustee is a solicitor, he may contract that the remuneration for his services as trustee shall include all professional services (*ib.*, (2)) In that case, however, his remuneration must still be in the nature of a commission or percentage (*In re Wayman*, 1889, 24 Q B D 68)

(14) DISCRETIONARY POWERS AND CONTROL THEREOF —

(a) **To regard directions of creditors** Subject to the provisions of the Act of 1883, the trustee must have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection, and any directions so given by the creditors at any general meeting shall in case of conflict be deemed to override any directions given by the committee of inspection (B A , 1883, s 89 (1))

(b) **To summon meetings.** The trustee may summon general meetings of the creditors for the purpose of ascertaining their

TRUSTEE (*cont.*), (*index*, p 316)

wishes, and it is his duty to summon meetings at such times as the creditors, by resolution, either at the meeting appointing the trustee or otherwise may direct, or whenever requested in writing to do so by one-fourth in value of the creditors (*ib.*, s s (2))

Any creditor, with the consent of one-sixth in value of the creditors (including himself), may at any time request the trustee or official receiver to call a meeting of the creditors, and the trustee or official receiver must do so within fourteen days (B A , 1890, s 18) Such person must deposit with the trustee a sufficient sum to pay the costs of summoning the meeting This sum may be repaid to him out of the estate if the creditors or the court so direct (*ib.*)

(c) **To apply to court** The trustee may apply to the court in manner prescribed for directions in relation to any particular matter arising under the bankruptcy (B A , 1883, s 89 (3))

In considering whether to apply to the court for directions, the trustee should exercise some degree of caution, for the estate has to pay the costs of an abortive application Further, if the estate is insufficient for that purpose, the trustee may be made personally liable (*Ex p Angerstein*, 1874, L R 9 Ch 479) The proper course for the trustee to adopt in a doubtful case is to obtain an indemnity from the creditors beforehand No general rule can be laid down upon the question whether the trustee will be made liable The court will consider the position of the trustee in each case (*In re Mackenzie, Ex p Sheriff of Herts*, 1899, 2 Q B 566), and he may be allowed to recoup himself out of the estate if his conduct has been bona fide (*Pitts v La Fontaine*, 1880, 6 A C 482)

Action in trustee's name If the trustee, in the exercise of his discretion, refuses to take legal proceedings for the assertion of his rights as trustee of the bankrupt's property, a creditor on giving an indemnity may be allowed to do so in his name (*Ex p Kearsley, In re Genese*, 1886, 17 Q B D 1)

(d) **When to use his own discretion** Subject to the provisions of the Act, the trustee must use his own discretion in the management of the estate and its distribution among the creditors (s 89 (4)).

(e) **Appeal to court against trustee** If the bankrupt, creditor, or other person is aggrieved by an act or decision of the trustee,

TRUSTEE (*cont*), (*index*, p 316)

he may apply to the court, and the court may make such order as it thinks just (B A , 1883, s 90)

(f) **Meeting to consider action of trustee** If the Board is of opinion that any act done by a trustee, or any resolution passed by a committee of inspection, should be brought to the notice of the creditors, for the purpose of being reviewed or otherwise, the official receiver may summon a meeting of creditors accordingly to consider the same, and the expenses of summoning such meeting must be paid by the trustee out of any available assets under his control (R 319)

(g) **Control by Board of Trade** The Board of Trade takes cognisance of the conduct of trustees, and in the event of any trustee not faithfully performing his duties, or in the event of any complaint being made to the Board by any creditor in regard thereto, the Board must inquire into the matter, and take such action thereon as may be deemed expedient (B A , 1883, s 91 (1))

The Board may require any trustee to answer any inquiry made by them in relation to any bankruptcy in which he is engaged, and may apply to the court to examine on oath the trustee or any other person concerning the bankruptcy (*ib* , s s (2)), and may also direct a local investigation to be made of his books and vouchers (*ib* , s s (3))

(\) **VESTING OF PROPERTY** (see also *Realisation of Property, infra*)

(a) **Generally** • Until a trustee is appointed the official receiver is the trustee for the purposes of the Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt vests in the trustee

On the appointment of a trustee the property forthwith passes to and vests in the trustee appointed

The property of the bankrupt passes from trustee to trustee, including under that term the official receiver when he fills the office of trustee, and vests in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever

The certificate of appointment of a trustee is deemed in law to be a conveyance or assignment of property, and may be registered, enrolled and recorded accordingly (B A . 1883, s 54)

The first paragraph of this section vests the official receiver with

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all the powers of a trustee. Consequently he can during the period of his appointment sell the bankrupt's property, and exercise any other powers of the trustee (see *Tinquant v Board of Trade*, 1886, 11 A C 286)

R 318 of the Bankruptcy Rules provides that where a debtor is adjudged bankrupt, and a trustee is appointed, the official receiver must forthwith put the trustee into possession of all the bankrupt's property of which the official receiver may be possessed, provided that the trustee must, before the estate is handed over, have discharged any balance due to the official receiver on account of fees, costs, and charges properly incurred by him and payable under the Act, and on account of all advances properly made by him in respect of the estate, together with interest on such advances at the rate of 4 per cent. The trustee must also have discharged or undertaken to discharge all guarantees which have been properly given by the official receiver for the benefit of the estate, and the trustee must pay all fees, costs, and charges of the official receiver which may not have been discharged by the trustee before being put into possession of the property of the bankrupt, and whether incurred before or after he has been put into such possession.

(A) POWER TO DEAL WITH BANKRUPT'S PROPERTY —

(a) **Generally** Subject to the provisions of the Act of 1883, the trustee may, by virtue of s 56, do all or any of the following things —

(1) Sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt), by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels.

(2) Give receipts for any money received by him, which receipts shall effectually discharge the person paying the money from all responsibility in respect of the application thereof.

(3) Prove, rank, claim, and draw a dividend in respect of any debt due to the bankrupt.

(4) Exercise any powers the capacity to exercise which is vested in the trustee under the B A, 1883, and execute any powers of

TRUSTEE (*cont*), (*index*, p 316).

attorney, deeds, and other instruments for the purpose of carrying into effect the provisions of this Act

- (5) Deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it, and ss 56-73 (both inclusive) of the 3 & 4 Will IV c 74—being an Act “for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance”—are to extend and apply to proceedings under the Bankruptcy Act, as if those sections were re-enacted and made applicable in terms to those proceedings (B A, 1883, s 56)

The expression “subject to the provisions of the Act of 1883” has reference to s 89, which provides that the trustee is to have regard to the wishes of the creditors (see sub tit *Control over Trustee*).

Sale of property to trustee or committeeman Neither the trustee nor any member of the committee of inspection of an estate may, while acting as trustee or member of such committee, except by leave of the court, either directly or indirectly, by himself or any partner, clerk, agent, or servant, become purchaser of any part of the estate. Any such purchase so made may be set aside by the court on the application of the Board of Trade or any creditor (R 316). In the case of *Luddy's Trustee v Peard*, 1886, 33 Ch D 500, a sale to the solicitor of the bankrupt was set aside. A sale to a brother and alleged partner of the trustee has also been set aside (*Ex p Moore*, 1882, 51 L J Ch 72). The rule, however, does not extend to purchase by a partner of a committeeman purchasing on his own account and not in any way for his firm (*In re Galland*, 1897, 2 Q B 8). The bankrupt himself (*Kitson v Hardwick*, 1872, L R 7 C P 473), or a mortgagee (*Ex p Say*, 1832, 1 D & C 32) may purchase.

Position of purchaser from trustee A purchaser from a trustee of a business and goodwill cannot restrain the bankrupt from *bonâ fide* commencing a new business and soliciting his old customers (*Walker v Mottram*, 1881, 19 Ch D 355).

(b) Powers exercised by permission of committee of inspection.

Generally In addition to the powers which the trustee may exercise on his account, there are certain things which he can (by

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virtue of s 57) do with the consent of the committee of inspection. As to the appointment and functions of that body, see *Committee of Inspection*. Where there is no such committee, the Board may permit these acts or things to be done by the trustee (see *B A*, 1883, s 22), and any functions of the committee of inspection which devolve on the Board may, subject to the directions of the Board, be exercised by the official receiver.

The permission must not be a general permission to do all or any of the following things, but must only be a permission to do the particular thing or things for which permission is sought in the specified case or cases. The following things are mentioned in s 57 —

(1) *Conduct of business* “ Carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same ”

It should here be mentioned that where the trustee carries on the business of the debtor, he must not without the express sanction of the court purchase goods for the carrying on of the business from his employer (if any), or from any person whose connection with the trustee is of such a nature as would result in the trustee obtaining any portion of the profit (if any) arising out of the transaction. The cost of obtaining such sanction must be borne by the person on whose behalf it is obtained (*B R*, 316A). It is more than likely that there will be some dispute amongst the creditors as to carrying on the business. A creditor cannot insist on an immediate sale unless he is able to prove some particular damage (*Ex p Hall*, 1838, 2 Dea 263), but it seems that where a majority of the creditors desire to carry on the business, their resolution is not binding on the minority, who may apply to the court to have the resolution declared invalid (*Ex p Emmanuel*, *In re Batey*, 1881, 17 Ch D 35). If the trustee does carry on the bankrupt's business, he must keep a distinct account of the trading (*B R*, 308).

(2) *Conduct of actions* “ Bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt ”

A trustee who brings an action for the benefit of the estate need not give security for costs, although he is insolvent in circumstances (*Denston v Ashton*, 1869, L R 4 Q B 590). He should not allow

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a creditor to bring an action in his name, unless the suit can benefit the estate generally (*Ex p Cooper, In re Zucco*, 1875, L R. 10 Ch. 510).

Where an action is pending at the date of the bankruptcy, and the trustee declines to go on with it, it will be stayed by the court (*Warder v. Saunders*, 1882, 10 Q. B D 114) (See further as to the rights of a trustee as to bringing and defending suits, *Williams*, p 286)

(3) *Employment of solicitor* "Employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the committee of inspection "

This sub-section as to the employment of a solicitor is binding on the official receiver when acting as trustee (*In re Duncan*, 1892, 1 Q B 331) The sanction of the committee, which must be obtained before the employment, except in a case of urgency (*B A*, 1890, s 15 (3)), must be specific, though it need not be in writing (*In re Vavasour*, 1900, 2 Q B 309) If the trustee has duly obtained the sanction of the committee to the appointment, he will not be liable for the laches of the solicitor Solicitor's costs cannot be charged for mere administrative work, he can only be paid as on a *quantum meruit* (*In re Pryor, Ex p Board of Trade*, 1888, 5 Mor 232).

(4) *Accept future payment* "Accept as a consideration for the sale of any property of the bankrupt a sum of money payable at a future time, subject to such stipulations as to security and otherwise as the committee think fit."

(5) *Mortgage debtor's property* "Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts "

(6) *Arbitrations, compromises, etc* "Refer any dispute to arbitration, compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt, on the receipt of such sums, payable at such times, and generally on such terms as may be agreed on."

It will be seen that by virtue of s 89 (3) of the Act, the trustee may apply to the court for directions; but where an application

TRUSTEE (*cont*), (*index*, p 316)

is made with regard to a compromise, the court will not express any opinion upon it, or interfere in any way (*In re Pilling*, 1906, 2 K B 644, see also *Award*)

(7) *Compromise claims* "Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable under the bankruptcy

(8) "Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person "

A compromise effected by the trustee in accordance with this provision may be overruled by the creditors (see s 89, par (1), p 326, *ante*, and *In re Ridgway, Ex p Hullball* 1889 6 Mor 277) An arrangement made between a creditor and a trustee, by which the creditor may carry on an action is not "champertous" (*Guy v Churchill*, 1887, 40 Ch D 481)

(9) *Divide peculiar property* "Divide in its existing form amongst the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot be readily or advantageously sold "

(10) *Power to allow bankrupt to manage property* Other powers are exercisable by permission of the committee by virtue of other sections Thus, the trustee may also with the permission of the committee, appoint the bankrupt to superintend the management of the property of the bankrupt or of any part thereof, or to carry on the trade (if any) of the bankrupt for the benefit of his creditors, and in any other respect to aid in administering the property in such manner and on such terms as the trustee may direct (B A, 1883, s 64 (1))

If the bankrupt is allowed to trade and to incur fresh liabilities, questions may arise as to the rights of the new creditors who are thus brought into existence It has been held (following *Ex p Ford*, 1 Ch D 521) that where a bankrupt traded unknown to the trustee, acquired property, and then became bankrupt again, the property so acquired are assets in the first bankruptcy (*In re Clark, Ex p Beardmore*, 1894, 2 Q B 393) If there is a surplus in the first

TRUSTEE (*cont*), (*index* p 316).

bankruptcy, the trustee in the second will only be entitled to it in so far as the bankrupt has not dealt with it prior to the date of the second bankruptcy (*Bird v Philpott*, 1900, 1 Ch 822)

(11) *Allowance to bankrupt for maintenance or service* The trustee may also from time to time, with the permission of the committee of inspection, make such allowance as he may think just to the bankrupt out of his property for the support of the bankrupt and his family, or in consideration of his services if he is engaged in winding up his estate, but any such allowance may be reduced by the court (s 64 (2))

Such allowance must be in money, unless the creditors by special resolution otherwise determine, and its amount must be entered in the trustee's accounts (R 296). The official receiver also has power (subject to regulations made by the Board of Trade) to make an allowance to the bankrupt for the support of himself and his family (see R 325) The committee of inspection may also apply to the Board of Trade to allow the trustee to open an account at a local bank (B A , 1883, s 74)

(\II) REALISATION OF PROPERTY BY TRUSTEE —

(a) *Possession of property generally* The trustee must, as soon as may be, take possession of the deeds, books, and documents of the bankrupt, and all other parts of his property capable of manual delivery (B A , 1883, s 50 (1))

In relation to and for the purpose of acquiring or retaining possession of the property of the bankrupt, he is to be in the same position as if he were a receiver of the property appointed by the High Court, and the court may on his application, enforce such acquisition or retention accordingly (*ib* , s s (2))

(b) *No lien on books, etc.* No person can as against the official receiver or trustee withhold possession of books of account belonging to the debtor or set up any lien thereon (B. R , 349).

Where the debtor's business has been carried on by a trustee under a creditor's deed, the trustee in bankruptcy may either treat him as an agent, in which case he may have an account of the profits made, or else treat him as a trespasser, in which case he can have an account of the value of the property at the time when

TRUSTEE (*cont.*), (*index*, p 316)

the trustee under the deed took possession of it (*Ex p Vaughan*, 1884, 14 Q B D 25, *per* Stephen, J, at p 30)

(c) Stocks, shares, etc Where any part of the property of the bankrupt consists of stock, shares in ships, shares, or any other property transferable in the books of any company, office, or person, the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt (*ib*, s 50 (2) (3))

(d) Copyhold, choses in action, etc. Where any part of the property of the bankrupt is of copyhold or customary tenure, or is any like property passing by surrender and admittance or in any similar manner, the trustee is not compellable to be admitted to the property, but may deal with it in the same manner as if it had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint, and any appointee of the trustee must be admitted to or otherwise invested with the property accordingly (*ib*, s s (4))

Where any part of the property of the bankrupt consists of things in action, such things are deemed to have been duly assigned to the trustee (*ib*, s s (5))

(e) Surrender of property to the trustee Any treasurer or other officer, or any banker, attorney, or agent of a bankrupt, must pay and deliver to the trustee all money and securities in his possession or power, as such officer, banker, attorney, or agent, which he is not by law entitled to retain as against the bankrupt or the trustee. If he does not he is guilty of a contempt of court (*ib*, s s (6))

(XIII) MISCELLANEOUS POWERS, ETC, OF TRUSTEE —

(a) Public examination As to the duty of the trustee to take part in the public examination, see *Public Examination*, p 256

(b) Admission or rejection of proofs As to the admission or rejection of proofs by the trustee, see *Proof of Debts*, p 241

(c) Payments for services rendered to estate As to power of trustee to admit payments for services rendered to the estate, see *Title of Trustee*, p 314.

(d) Goods taken in execution Where goods taken in execution are in the hands of the sheriff, the trustee can exercise certain important rights over them (see *Sheriff*, p. 295)

TRUSTEE (*cont*), (*index*, p 316)

(e) Preferred debts As to the duty of the trustee to make payment of preferred debts, see *Priority of Debts*, p 231

(f) Redemption of securities As to redemption of the security of a secured creditor by a trustee, see *Secured Creditor*, p 290

(g) Disclaimer As to the liability of a trustee who has disclaimed, see *Disclaimer*, p 135

(h) Accounts of trustee (see *Accounts of Trustee*)

As to the position of trustees under a settlement made by the bankrupt which is set aside, see *Voluntary Settlements*, p 342

As to the rights, etc, of a trustee under a composition or scheme, see *Composition or Scheme of Arrangement*, p 89

TRUSTEE UNDER COMPOSITION (See sub tit *Composition or Scheme of Arrangement*, p 89)

TRUSTEE UNDER DEED OF ARRANGEMENT

As to powers usually conferred on the trustee under a deed of arrangement, see *Deed of Arrangement*, p 89

UNCLAIMED FUNDS OR DIVIDENDS (and see *Dividends*, p 149)

Duty of trustee S 162 of the Bankruptcy Act, 1883, makes provision for the disposal of unclaimed funds or dividends By s s (1), where the trustee, under any bankruptcy, composition, or scheme, has under his control any unclaimed dividend which has remained unclaimed for more than six months, or where, after making a final dividend, such trustee shall have in his hands or under his control any unclaimed or undistributed moneys arising from the property of the debtor, he must pay the same to the Bankruptcy Estates Account at the Bank of England The Board of Trade must furnish him with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof

The Board may call upon the trustee to furnish accounts of sums so paid by him (R 346A)

S s (2) provides for the disposal of funds unclaimed under the Private Arrangement Act, 1844, the Bankrupt Law Consolidation Act, 1849, the Bankruptcy Acts, 1861 and 1869, and need not be further dealt with.

UNCLAIMED FUNDS OR DIVIDENDS (*cont*).

Persons laying claim to funds Any person claiming to be entitled to any moneys paid in to the Bankruptcy Estates Account pursuant to this section may apply to the Board for payment to him of the same, and the Board, if satisfied that the person claiming is entitled, must make an order for the payment to such person of the sum due (s s (4))

Any person dissatisfied with the decision of the Board of Trade in respect of his claim may appeal to the High Court

The Bankruptcy Estates Account The Board of Trade may at any time after the passing of this Act open the account at the Bank of England referred to in this Act as the Bankruptcy Estates Account (s s (5))

UNDISCHARGED BANKRUPT (and see **Control over Person and Property of Debtor , Duty of Debtor**).

Where an undischarged bankrupt, without the trustee's knowledge, carried on business and acquired property, and then again became bankrupt, the trustee in the first bankruptcy was held entitled to the property as against the trustee in the second, although in the second bankruptcy the act of bankruptcy was an assignment of property for the benefit of his creditors generally (*In re Clark, Ex p Beardmore*, 1894, 2 Q B 393)

As to whether an undischarged bankrupt can grant a bill of sale, see *Bills of Sale*, p 52

As to the right of an undischarged bankrupt to bring an action, see *Property Divisible amongst Creditors*

UNDUE PREFERENCE

As to the distinction between undue and fraudulent preferences, see *Fraudulent Preference*, p 177 See also *Discharge of Bankrupt*, p 128

UNLIQUIDATED DAMAGES. (See **Debts Provable in Bankruptcy**, p 106 , and see **Damages**.)

As to how far such damages are subject to the mutual credit clause, see *Mutual Credit and Set-Off*, p 204

UNLIQUIDATED DEBTS

A creditor who has only an unliquidated debt cannot vote at a creditors' meeting As to the meaning of the term, see *Meetings of Creditors*, p 197.

VACANCIES.

If a member of a committee of inspection becomes bankrupt, or compounds with his creditors, or is absent from five consecutive meetings of the committee, he vacates his office (see *Committee of Inspection*, p 76) As to vacancy in the office of trustee, see *Trustee*, p 320

VACATING OFFICE. (See Disqualifications)

VALUABLE CONSIDERATION.

As to what consideration is sufficient to sustain a settlement of a debtor's property, see *Voluntary Settlements*, p. 339.

VESTING ORDER

In certain cases the court may make an order vesting disclaimed property in persons interested, see *Disclaimer*, p 136

VESTRYMAN. (See Disqualifications of Bankrupt)

VEXATIOUS ACTIONS (See Discharge of Bankrupt, p 127)

VIVÂ VOCE EVIDENCE. (See Evidence)

VOID

As to the result of a voluntary settlement being made void by the bankruptcy laws, see *Voluntary Settlements*, p 341

VOLUNTARY SETTLEMENTS (and see Fraudulent Preference).**(i) VOLUNTARY SETTLEMENTS VOIDABLE AT COMMON LAW —**

- (a) *Generally*
- (b) *Settlements avoided by the 13 Eliz , c 5*
- (c) *Assignment of all property to one creditor*
- (d) *What creditors are affected*
- (e) *Bonâ fide settlements*, p 339
- (f) *Deed of arrangement*
- (g) *Valuable consideration*

(ii) VOLUNTARY SETTLEMENTS AVOIDED BY THE BANKRUPTCY ACT —

- (a) *Generally*
- (b) *The section summarised*, p 340
- (c) *Meaning of "settlement"*
- (d) *"Purchaser in good faith,"* p 341
- (e) *"Valuable consideration"*
- (f) *"Void"*
- (g) *Solvency of settlor*, p 342
- (h) *Protection of the trustees of a settlement.*

VOLUNTARY SETTLEMENTS (*cont*), (*index*, p 337)

Voluntary settlements, in so far as they are important in connection with the law of bankruptcy, may be conveniently dealt with under two heads, namely, Settlements voidable at common law, and Settlements voidable under the law of bankruptcy

(1) VOLUNTARY SETTLEMENTS VOIDABLE AT COMMON LAW —

(a) **Generally** If it were competent for a man to settle all his money on persons nearly related to him, so that at some future time that money would be out of reach of his creditors, the whole fabric of the law of bankruptcy would tumble to the ground. By a device of this kind a man might in fact enjoy the income of his property, and yet have no assets when his bankruptcy supervened.

The common law and certain ancient statutes do much, and the Bankruptcy Acts do more, to suppress this kind of fraud.

(b) **Settlements avoided by the 13 Eliz, c. 5** This ancient statute, which is practically declaratory of the common law, provides (in effect) that every feoffment, etc., of lands, tenements, hereditaments, goods, and chattels, or any of them . . . and every bond, suit, judgment, and execution "contrived of malice, fraud, collusion, or guile, to the end, purpose, and with intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, etc., shall be against that person, his heirs, executors, administrators and assigns, whose actions, etc., are or might be disturbed, etc., by such fraudulent proceedings, utterly void." But the Act does not extend to conveyances and assurances made *bonâ fide* and on good consideration, and does not necessarily invalidate a number of transactions which may be avoided as against a trustee in bankruptcy (see par (11), *infra*, *Ex p Games*, 1879, 12 Ch D. 314). For a full discourse upon this statute, see *Twyne's Case*, 1601, Sm L C. 1, and notes hereto.

(c) **Assignment of all property to one creditor**. It may be stated generally that the assignment of the whole of a man's property for the benefit of one creditor, or several, to the exclusion of others, is fraudulent under this Act, the necessary consequence of such a transaction being to defraud the excluded creditors (*Worsley v. De Mattos*, 1758, 1 Burr. 467).

(d) **What creditors are affected**: The creditors who are affected by a voluntary assignment under this Act need not have been in

VOLUNTARY SETTLEMENTS (*cont.*), (*index* p 337)

existence at the time when it was made "the principle being that a man who is going into trade cannot take the bulk of his property out of the reach of those who may become his creditors" (*Williams*, p 245, citing *Mackay v Douglas*, 1872, L R 14 Eq 106)

(e) *Bonâ fide settlements* · A settlement *bonâ fide* made by a man whose existing debts are all paid, the settlor retaining a reasonable income for himself, will not be set aside merely because subsequent creditors are prejudiced (*In re Lane-Fox, Ex p Gimblett*, 1900, 2 Q B 508) In *In re Holland*, (1902, 2 Ch 360), the court refused to set aside a settlement made in 1873 by a man who did not become bankrupt until 1898

(f) *Deed of arrangement* · A deed of arrangement will not necessarily be void, merely because it reserves a benefit to the debtor, or because a particular creditor is intentionally excluded from it (*Maskelyne & Cooke v Smith*, 1902, 2 K B 158, 1903, 1 K B 671) "The test is whether the deed gives the creditors a benefit, or gives the debtor a chance of gaining something at the expense of the creditors" (*Williams*, p 246)

(g) *Valuable consideration* While a merely colourable consideration will not suffice to sustain a deed, the consideration need not be adequate So the assignment of a reversion of £18,000 in consideration of an advance of £2,500 and £300 a year until bankruptcy was not upset, either under this statute or the Bankruptcy Acts (*Ex p Eyre*, 1881, 44 L T 922, for other cases, see *Williams*, p 246) The trustee of a settlement has been held not to be a purchaser for valuable consideration (*Ex p Hillman, In re Pumfrey*, 1879, 10 Ch D 622)

(ii) VOLUNTARY SETTLEMENTS AVOIDED BY THE BANKRUPTCY ACTS —

(a) *Generally* · Certain settlements, which might not be successfully attacked under the statute of Elizabeth, or at common law, may be impeached under s 47 of the Bankruptcy Act, 1883. That section provides as follows —

Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of

VOLUNTARY SETTLEMENTS (*cont.*), (*index*, p 337),

property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and, shall if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof (B A, 1883, s 47 (1))

Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy (*ib.*, (2))

"Settlement" shall for the purposes of this section include any conveyance or transfer of property (*ib.* (3))

(b) The section summarised The effect of the section may be thus briefly stated —

In order to set aside a settlement made within two years before the bankruptcy, it must be shown that it was made in bad faith and without consideration A settlement made within ten years will be set aside unless the parties claiming under it can prove that the settlor could pay his debts without the aid of the property comprised in it, and that the interest of the settlor passed to the trustee under the settlement

(c) Meaning of "settlement" Any conveyance, assignment, or transfer appears to be a settlement within the section A transfer of shares (*Ex p Todd, In re Ashcroft*, 1887, 19 Q B D 186), or a purchase of shares in a ship, registered in the name of the transferee (*In re Player, Ex p. Harvey*, 1885, 54 L J Q B 553), is a settlement A gift of bills, bonds, notes, and other securities would also seem to

VOLUNTARY SETTLEMENTS (*cont.*), (*index*, p 337)

be included A gift of money, if the money is intended to be preserved, may be a settlement, otherwise where the money is to be spent, as where a father makes an allowance to his son (*In re Player*, • *supra*)

There is no settlement unless it is the intention of the giver that the money shall be invested in some form which will enable it subsequently to be traced (*In re Plummer*, 1900, 2 Q B 790) Where the owner of a policy on his life, by a post-nuptial settlement, made more than ten years before his bankruptcy, assigned it to trustees for his wife and children and continued to pay the premiums voluntarily, being under no covenant to do so, it was held that the trustee in bankruptcy was entitled neither to the policy moneys or the premiums (*In re Harrison, Ex p Whimney*, 1900, 2 Q B 710)

(d) "Purchaser in good faith". The expression "purchaser" means one who has given valuable consideration, not a purchaser in the legal sense of the term (*Hance v Harding*, 1888, 20 Q B D 732, *In re Parry, Ex p Salaman*, 1904, 1 K B 129) It is sufficient if there be good faith on the part of the purchaser. It is not necessary that both parties should so act (*Mackintosh v Pogose*, 1895, 1 Ch 505)

(e) "Valuable consideration". The question as to whether there was valuable consideration appears to be for the court to determine in each case The fact that a settlement is declared to be made for "five shillings and other valuable considerations" does not oblige the court to hold it to be for valuable consideration (*Walker v Burrows*, 1745, 1 Atk 93) It would seem that "natural love and affection" cannot be relied upon to support valuable consideration which will make a settlement good as against creditors (see *Matthews v Feaver*, 1786, 1 Cox 278)

(f) "Void" It is necessary to consider the meaning of the word "void" with some care In the first place, it does not imply that a settlement which contravenes the section is void as from the date upon which it is made It only becomes void when the trustee's title accrues So one who benefits by a settlement made *bonâ fide* and without notice has a good title against the trustee (*In re Biall, Ex p Norton*, 1893, 10 Mor 166, *In re Carter and Kenderdine's Contract*, 1897, 1 Ch 776) Further, a settlement is only avoided

VOLUNTARY SETTLEMENTS (*cont*), (*index*, p 337)

in so far as is necessary to satisfy the debts of the bankrupt and pay the costs of the bankruptcy (*In re Sims, Ex p Sheffield*, 1896, 3 Mans 340) So, if a man settled £100,000 on a friend for no consideration, and failed within six months for £50,000, it is conceived that the person entitled under the settlement could retain the balance after paying off the trustee

(g) **Solvency of settlor** In the case of a settlement made within ten years the solvency of the settlor may have to be considered. It is essential that the settlor should be able to pay his debts in the way which he would pay them if he continued in business. Consequently, in order to show that a man is solvent apart from the property comprised in the settlement, the value of the implements of his trade and of the goodwill of his business, is not, if he was intending to continue in business, to be taken into account, at any rate if that value is to be taken into account, it can only be such a value as would be realised at a forced sale (*Ex p Russell, In re Butterworth*, 1882, 19 Ch D 588)

(h) **Protection of the trustees of a settlement** The trustees of a settlement which becomes void on a bankruptcy are entitled to a lien on the property for expenses properly incurred by them as trustees (*In re Holden Ex p O R*, 1887 20 Q B D 43)

VOTE, VOTING

A trustee or his partner, etc., may not vote on any resolution affecting the trustee's remuneration, see *Trustee*, p 324

As to voting at creditors' meetings, see *Meetings of Creditors*, p 197

VOUCHERS

The official receiver has power to call for vouchers as to proof of debts (B A, 1883, Sch II (4)) The vouchers of a trustee may have to be examined at a local inquiry (*ib*, s 91, R 319)

WAGES

As to proofs for wages due to workmen, clerks, etc., see *Proof of Debts*, p 238

WARING, EX P, RULE IN

For the rule in *Ex p Waring*, 1815, 19 Ves 345, see *Property not Divisible amongst Creditors*, p 249

WARRANT.

Generally . Any warrant of a court having jurisdiction in bankruptcy in England may be enforced in Scotland, Ireland, the Isle of Man, the Channel Islands, and elsewhere in His Majesty's dominions, in the same manner and subject to the same privileges in and subject to which a warrant issued by any justice of the peace against a person for an indictable offence against the laws of England may be executed in those parts of His Majesty's dominions respectively in pursuance of the Acts of Parliament in that behalf (1883, s 119 (1))

Search warrant A search warrant issued by a court having jurisdiction in bankruptcy for the discovery of any property of a debtor may be executed in manner prescribed or in the same manner and subject to the same privileges in and subject to which a search warrant for property supposed to be stolen may be executed according to law (*ib* , (2)) See further as to search warrants, *Realisation of Property*, p 258

WARRANT OF ARREST.

A person who refuses to attend and give information as to the whereabouts, etc , of property of the debtor may be brought up on warrant for the purpose (see *Discovery of Debtor's Property and Documents*, p 142)

WEARING APPAREL. (See Property not Divisible amongst Creditors, p. 247)

WITNESS.

Generally : Persons knowing the affairs, etc , of the debtor may be summoned to give evidence (see *Discovery of Debtor's Property*, p 142 , where such a witness is too ill to attend at court, he may be examined elsewhere (*In re Bradbrook*, 1889, 23 Q B D 226)

As to how far a witness who is subpoenaed to give information as to the whereabouts of the debtor's property, etc , is privileged, see *Discovery of Debtor's Property and Documents*, p. 143.

Subpoena : A subpoena for the attendance of a witness will be issued by the court either for the purpose of his giving evidence or producing documents (Rs. 61-63) Disobedience to a subpoena may involve committal for contempt (R. 70)

Costs : The court may limit the number of witnesses to be

WITNESS (*cont*)

allowed on taxation (R 64), and costs may be allowed whether the witness has been examined or not (R. 65).

Conduct money A witness (other than the debtor) who is required to attend for examination is entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in court (R 71).

Deposition The court may order the deposition of a witness to be taken before an officer of the court, either at the court or elsewhere, and may allow such deposition to be given in evidence (R 66) (see further sub tit *Death*, p 102)

Evidence on commission An order to take evidence on commission will be issued in accordance with the procedure of the High Court (R. 68)

WORKMEN.

Special provision for the proof of debts due to workmen where a number of workmen are owed money by a bankrupt (see *Proof of Debts*, p 238). Workmen employed by a bankrupt are entitled to preferential treatment in the distribution of assets amongst creditors (*Priority of Debts*, p. 232)

WORKMEN'S COMPENSATION ACT.

Claimants against the estate of the bankrupt under the Act are entitled to preferential treatment (see *Priority of Debts*)

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